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Supreme Court of the United States

Nos. 873-890. October Term, 1940.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

vs.

J. H. THAYER MARTIN, State Tax Commissioner of the State of New Jersey, *et als.*

(List of cases inside.)

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

RESPONDENTS' OPPOSING BRIEF.

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INDEX.

	PAGE
CITATIONS:	
Federal Statutes	vi
New Jersey Constitution	vi
New Jersey Statutes	vii
Revised Statutes (N. J.)	vii
Publications	vii
Table of Cases	iii
CASES INVOLVED	1
OFFICIAL REPORTS OF OPINIONS BELOW	2
STATEMENT OF CASE	3
Assessments	4
Levy and Distribution of Taxes	5
ARGUMENT:	
I. There are no special or important reasons for granting the petition in these cases	7
II. All of the issues here presented are *res judicata*	9
Review Procedure	9
(a) Previous Cases	12
(b) The Present Cases	22
Same issues here	28
The issues previously decided	29
The doctrine of *res judicata*	30
Application of these cases	31

PAGE

III. No federal question is presented 33

(a) Valuation of Land 41

(b) Valuation of Structures 41

IV. The judgments of the District Court restrained proceedings in a State Court, in violation of Section 265 of the judicial code.... 44

V. These suits were in substance brought against the State of New Jersey without its consent, in violation of the Eleventh Amendment of the Federal Constitution 50

VI. Petitioners had a plain, adequate and complete remedy at law 52

VII. Earnings is not the dominant factor in tax valuations under New Jersey law 55

The Pattern of the Case 56

Distinguishing Characteristics 56

Earnings Method 57

Terminals 61

A Conspicuous Example 67

Impartial Expert Opinion 69

Depression Taxes 73

CONCLUSION 76

APPENDIX "A"—Extracts from "Proceedings of the Thirteenth Annual Conference on Taxation under the Auspices of the National Tax Association held at Baltimore, Maryland, October 25-28, 1937".... 77

APPENDIX "B"—Depression Tax Burdens 79

TABLE OF CASES.

PAGE

American Surety Co. v. *Baldwin*, 287 U. S. 156..... 47, 54
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337..... 27, 53
Ashwander v. *Tenn. Val. Authority*, 19 Fed. Supp. 190 31
Atlas Life Ins. Co. v. *Southern*, 306 U. S. 563..... 53

Bailey v. *Megan*, 102 Fed. (2d) 651..... 8
Baldwin v. *Iowa T. M. Assn.*, 283 U. S. 522..... 31
Baltimore S. S. Co. v. *Phillips*, 274 U. S. 316..... 30, 31
Bass R & G. Ltd. v. *State Tax Com.*, 266 U. S. 271.. 73
Bates v. *Bodie*, 245 U. S. 520..... 30
Bell Tel. Co. v. *Pennsylvania Public Utility Com.*, 309 U. S. 30 53
Bugbee v. *Van Cleve*, 99 N. J. E. 825..... 26
Burrill v. *Locomobile Co.*, 258 U. S. 34..... 27, 53

Central R. Co. v. *State Tax Dept.*, 109 N. J. L. 395; aff. 112 N. J. L. 5 Cert. denied 293 U. S. 568..... 27
Central R. Co., v. *Martin*, N. J. Tax Reports, 1934-9 pp. 82-7; pp. 231-2 2
Central R. Co. v. *Martin*, 30 Fed. Supp. 41..... 2
Central R. Co. v. *Martin*, 57 N. J. L. Journal 115; N J. Tax Reports (1912-34), p. 675; aff. 114 N. J. L. 69 .....13, 26, 35, 39, 40
Central R. Co. v. *Martin*, 115 Fed. (2d) 968..... 2, 40
Central Railroad Co. v. *Martin*, 114 N. J. L. 69 17, 23, 35, 36, 39, 40, 42, 69, 72
Central Railroad Co. of N. J., et als. v. *J. H. Thayer Martin, State Tax Com'r*, N. J. Tax Reports (1934-9), p. 82; 231 ..... 23, 24
Central R. Co. v. *State Board*, 49 N. J. L. 1.....20, 26, 35
Central Realty Co. v. *Board of E. & R.*, 110 W. Va. 437; 158 S. E. 537..... 73
Chambers v. *Florida*, 309 U. S. 227..... 35

PAGE

Chicago Cemetery Assn. v. *United States,* 19 Fed. Supp. 228 31
Chicot Co. Dr. Dist. v. *Baxter State Bank,* 308 U. S. 371 30
City Bank Farmers Trust Co. v. *Schnader,* 291 U. S. 24 ..... 26, 27
Curtis & Hill &c. Co. v. *State Highway Com.,* 91 N. J. E. 421 51

Erie R. Co. v. *Hilt,* 247 U. S. 97..... 26
Erie R. Co. v. *Duplak,* 286 U. S. 440..... 26

Fidelity Union Trust Co. v. *Field,* 311 U. S. 169, 178, 180 ..... 26, 27
Forsyth v. *Hammond,* 166 U. S. 506..... 31

Great Northern Ry. Co. v. *Weeks,* 297 U. S. 135 .....8, 34, 56, 57, 61, 75
Grubb v. *Public Utilities Com.,* 281 U. S. 470..... 31, 54

Hewson v. *Newark,* 95 N. J. L. 28..... 26
Hill v. *Martin,* 296 U. S. 393.....12, 45, 48, 49, 54

Illinois Central R. Co. v. *Minnesota,* 309 U. S. 157.34, 35, 53
Indiana Mfg. Co. v. *Koehn,* 188 U. S. 691..... 54

Keokuk & Hamilton Br. Co. v. *Salm,* 258 U. S. 122... 54
Ke-Sun Oil Co. v. *Hamilton,* 61 Fed. (2d) 215..... 44

Lawrence Township v. *State Board,* 124 N. J. L. 465 26
Lehigh Valley R. Co. v. *Martin,* 19 Fed. Supp. 63; aff. 100 Fed. (2d) 139 .....21, 29, 40, 41, 53, 62
Lehigh Valley R. Co. v. *Martin,* 100 Fed. (2d) 139; cert. denied, 306 U. S. 651; rehearing denied, 306 U. S. 669 .....12, 21, 30, 51, 52, 55
Lehigh Valley R. Co. v. *Board P. U. Com'rs.,* 278 U. S. 24 54

McGoldrick v. *Berwin-White Coal Mining Co.,* 309 U. S. 33 43

PAGE

Madden v. *Kentucky*, 309 U. S. 83 34
Mass. Mut. L. Ins. Co. v. *United States*, 288 U. S. 269 20
Milwaukee, E. R. & L. Co. v. *Wisconsin*, 252 U. S. 100 73
Minnesota v. *Probate Court*, 309 U. S. 270..... 35, 54

Nashville, C. & St. L. Ry. v. *Browning*, 310 U. S. 362 .....8, 34, 36, 42, 52, 56, 57, 70, 73, 75

Ohio Bell Tel. Co. v. *Public Service Com.*, 301 U. S. 292, 300-1 57
Obert v. *Hammel*, 18 N. J. L. 73..... 26

Pittsburgh C. C. & St. L. Ry. Co. v. *Backus*, 154 U. S. 421 26

Providence Bank v. *Billings*, 4 Peters (29 U. S.) 514 73

Railroad Commission v. *Rowan & Nichols Oil Co.*, 310 U. S. 573 37
Railroad Commission v. *Rowan & Nichols Oil Co.*, 85 L. Ed. Adv. Op. 321 (Second case)..... 38
Riddle Co. v. *New Auditorium Pier Co.*, 78 N. J. L. 520 26
Roebling's Estate, 91 N. J. E. 72..... 26
Rowley v. *Chicago & N. W. R. Co.*, 392 U. S. 102.... 8, 60

Salomon v. *State Tax Commission*, 278 U. S. 484.... 36
Six Companies v. *Joint Hy. District*, 311 U. S. 180.. 27
Somers v. *City of Meriden*, 174 Atl. 184..... 73
Southern Pac. R. Co. v. *United States*, 183 U. S. 519. 30
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89.... 54
State v. *Flavell & Fredericks*, 24 N. J. L. 370..... 62
Stewart D. G. Co. v. *Lewis*, 294 U. S. 550, 562..... 73
State, N. J. S. R. R. Co. v *Railroad Com'rs.*, 41 N. J. L. 235 ..... 33, 73
State Board v. *Central R. Co.*, 48 N. J. L. 146 .....19, 36, 38, 42, 69
Stoll v. *Gottlieb*, 305 U. S. 165..... 31

PAGE

Strobel Steel Constr. Co. v. *State Highway Com.*, 120 N. J. L. 298 51
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U. S. 381 ..... 27, 31, 38, 53
Susquehanna Power Co. v. *State Tax Comm.*, 283 U. S. 291 62
Sweet v. *City of Auburn*, 180 Atl. 803..... 73

Taylor v. *Secor*, 92 U. S. 575 ..... 36, 44
Thompson v. *Board*, 57 N. J. L. 628..... 26

Underwood T. Co. v. *Chamberlain*, 254 U. S. 113.... 73
Union Indemnity Co. v. *State Highway Com.*, 105 N. J. L. 656 51
United States v. *Dakota Mountain Oil Co.*, 288 U. S. 459 20

Wallace v. *Hines*, 253 U. S. 66..... 61
Wells Fargo & Co. v. *Taylor*, 254 U. S. 175..... 44
West v. *American T. & T. Co.*, 311 U. S. 233..... 27
Wisconsin v. *J. C. Penney Co.*, 85 L. Ed. Adv. Op. 222 75
Wisconsin v. *Illinois*, 278 U. S. 367..... 20
Worcester County Tr. Co. v. *Riley*, 302 U. S. 292.... 53, 54
Wright v. *Central of Ga. R. Co.*, 236 U. S. 678..... 20, 21

FEDERAL STATUTES.

28 U. S. C. A. sec. 344 12
Title 28, Sec. 384, U. S. C. A., Section 267, Judicial Code 55

NEW JERSEY CONSTITUTION.

N. J. Const., Art. IV, Sec. VII, pgf. 12 69

PAGE

NEW JERSEY STATUTES.

P. L. 1884, p. 142 ..... 4, 6
P. L. 1884, p. 159 35
P. L. 1888, pp. 276-7 35
P. L. 1888, p. 269 ..... 14, 39
P. L. 1897, p. 147 6
P. L. 1905, p. 189 6
P. L. 1906, p. 121 5
P. L. 1906, p. 266 33
P. L. 1909, p. 336 48
P. L. 1913, p. 753 5
P. L. 1919, p. 15 5
P. L. 1931, p. 823 4

REVISED STATUTES (N. J.).

R. S. 18:10-31 5
32 5
33 5
34 5
35 5
R. S. 54:1-1 26
R. S. 1937, Title 54, Part 4 39
N. J. S. Anno., Section 54:13-6 43
N. J. S. Anno., Section 54:13-15 43
R. S. 54:24-1 5
2 5
3 5
4 5
R. S. 54:24-7 to 13 6
R. S. 54:26-4 35

PUBLICATIONS.

From Indian Trail to Iron Horse, Princeton History of New Jersey 63
Proceedings, 30th Annual Conference, National Tax Assn., pp. 229-301 71

Cases Involved.

The 24 cases before the District Court, and the Court of Appeals, Third Circuit, were carried and reported under the title shown on the cover of the Volume V as printed by the Clerk of this Court. To preserve the identity of the case here, the same title is used on the cover of this brief. However, since the Central Railroad Company of New Jersey and New York, Susquehanna & Western Railroad Company have not joined in this petition for *certiorari*, the cases now before the Court are as follows:

Cases	Tax Year	C. C. A. No.	S. C. No.
LEHIGH VALLEY RAILROAD COMPANY,	1934	7351	873
	1935	7359	874
	1936	7367	875
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,	1934	7349	876
	1935	7357	877
	1936	7365	878
ERIE RAILROAD COMPANY,	1934	7350	879
	1935	7358	880
	1936	7366	881
NEW JERSEY & NEW YORK RAILROAD COMPANY,	1934	7352	882
	1935	7360	883
	1936	7368	884
NEW YORK CENTRAL RAILROAD COMPANY,	1934	7353	885
	1935	7361	886
	1936	7369	887
NEW YORK & LONG BRANCH RAILROAD COMPANY,	1934	7354	888
	1935	7362	889
	1936	7370	890

Petitioners,

v.

J. H. THAYER MARTIN, State Tax Commissioner; FRANK J. MURRAY, Comptroller of the State of New Jersey; WILLIAM H. ALBRIGHT, Treasurer of the State of New Jersey; and DAVID T. WILENTZ, Attorney General of the State of New Jersey,

Respondents.

Official Reports of Opinions Below.

(a) State Board of Tax Appeals, (N. J.); 1934 cases, *Central R. Co.* v. *Martin,* N. J. Tax Rep. 1934-9, pp. 82-7; 1935 cases, *Central R. Co.* v. *Martin,* N. J. Tax Rep. 1934-9, pp. 231-2.

(b) United States District Court, District of N. J., *Central R. Co.* v. *Martin,* 30 Fed. Supp. 41.

(c) United States Circuit Court of Appeals, *Central R. Co.* v. *Martin,* 115 Fed. (2d) 968; rehearing denied January 24, 1941.

Statement of Case.

Twenty-four cases (including the 18 involved in the present petition) came to the Circuit Court on separate appeals from final decrees entered January 25, 1940 in the District Court, for the District of New Jersey, with accompanying injunction orders, restraining respondents as State Tax Commissioner, Comptroller, Treasurer and Attorney General of the State of New Jersey, respectively, from collecting or attempting to collect in excess of 70% of the taxes levied on 384 separate assessments for the years 1934, 1935, and 1936 against 44 separately taxed companies owning railroad property in New Jersey, including all of the petitioners, except New York Central Railroad Company which did not own any property in New Jersey and was not taxed in any of those years.

The Circuit reversed the judgment of the District Court and, on November 27, 1940, entered judgments remanding the cases to the District Court with instructions to dismiss the complaints. Its mandate was stayed, first, to permit a petition for rehearing, which was denied on January 24, 1941, and, later, to permit the filing of a petition for *certiorari* in this Court, which was filed on March 26, 1941.

The basic controversy here involves the validity of certain property valuations (known as assessments) by which the taxes levied against certain companies were measured for taxation in the years 1934, 1935 and 1936. Objections fall under two classifications:

> (a) They violate the constitution and laws of the State of New Jersey (not questions of federal jurisdiction) and,

(b) They deny to petitioners due process of law under the Fourteenth Amendment.

Assessments.

By act of the legislature (herein referred to, with its amendments and supplements to date, as the "railroad tax act") approved April 10, 1884 *(P. L. 1884, p. 142)*, property used for railroad or canal purposes was segregated from other property, to be thenceforth taxed by a department of the state government, which, since 1931, has been known as the State Tax Department, under direction of the State Tax Commissioner *(P. L. 1931, p. 823)*.

The valuation of railroad property for taxation is delegated to the "Division of Engineering and Railroad Taxes" of that Department under the personal direction and supervision of the Chief Engineer of that Division, who is referred to herein as the "assessor".

The railroad tax act requires the assessor "to ascertain the true value of all property used for railroad * * * purposes of each railroad * * * company in this State, including its franchise," who "shall, in such ascertainment, ascertain;"

I. The length and value of the main stem of each railroad company, including the roadbed, not exceeding 100 feet in width, with its rails and sleepers, and all structures erected thereon and connected therewith, exclusive of passenger and freight buildings, and the length of such main stem in each taxing district;

II. The value of the other real estate of each railroad company used for railroad purposes in each taxing district,

including the roadbed (other than main stem), tracks, buildings, water tanks, water works, riparian rights, docks, wharves and piers; and all other real estate, except lands not used for railroad purposes;

III. The value of all tangible personal property of each railroad company, including the rolling stock, cars, locomotives, ferryboats, all machinery, tools, other tangible personal property, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this state, or run under its control in this state by a sleeping car company or other company.

IV. The value of the remaining property of each railroad company, including the franchise and all incorporeal property.

Levy and Distribution of Taxes.

Upon the valuations of the several classes of property, of *each* railroad company, as so ascertained, the assessor is required to compute and levy the following taxes against *each* railroad company:

(a) a tax on property in classes I, III and IV, at an "average rate," computed in the manner described in the statute *(P. L. 1906, p. 121; P. L. 1919, p. 15; P. L. 1913, p. 753; R. S. 54:24-1 to 54:24-4, incl.)*, which tax is required to be distributed; one half of one percent of the total valuation to the state and the balance to the several local school districts, and otherwise, for support of the public schools, *(P. L. 1913, p. 753; R. S. 18:10-31 to 18:10-35)*;

(b) a tax at the local tax rate for that year, upon the particular items of class II property of *each* railroad com-

pany located in *each local taxing district*, and the *entire* amount of that tax is required to be *alloted and paid over to the local taxing district in which the particular items* of such property are located *(P. L. 1897, p. 147; P. L. 1905, p. 189; R. S. 54:24-7 to 54:24-13, incl.)*.

Taxes so levied on railroad property are in lieu of all other taxation of the companies or their properties, and in all cases where the property of any company is assessed and taxed under this act, the shares of stock and the bonds and certificates of indebtedness of such company are not taxable in the hands of the stockholders, bondholders or creditors *(P. L. 1884, p. 142)*. Taxes are due on December 1, of the year for which they are levied. The amount conceded by the taxpayer to be due may then be paid and the balance withheld during a contest of the assessments or taxes.

The pertinent parts of the act, as amended or supplemented from time to time, are set forth in the answers *(R. 115-140)*.

Ninety-one railroad companies are separately taxed under this act, including a number of foreign corporations owning property in the state who, under lease, operating agreements, or stock control, use railroad property of domestic companies, and operate railroads in New Jersey under legislative permission. The annual railroad assessments involve the valuation of approximately 63,400 component items of property, including over 21,000 structures. The taxes enjoined by the District Court total $11,269,-082.09, exclusive of interest.

The District Court enjoined the collection, not only of taxes levied against the petitioners but also, of taxes

amounting to $6,684,339.27, levied against 37 other railroad companies *(R. 101, 152, 160-1, 169, 184, 197)* who were not parties to any of the suits, on the bare allegations that "under the terms of the leases or operating agreements" petitioners were "obligated to pay all lawful taxes imposed thereon" *(R. 99)*.

Since the pleadings and issues were the same in all of the cases, they were heard together on a consolidated record *(R. 420)* and decided in one opinion in the District Court *(R. 14-74)* and in the Circuit Court *(R. 9)*.

ARGUMENT.

I.

There are no special or important reasons for granting the petition in these cases.

(a) These cases do not present, or involve, any of the special and important reasons set forth in Rule 38, paragraph 5, sub-paragraphs (a) and (b), for granting writs of *certiorari* to review the judgments of the Court below.

(b) These cases involve no interest of law, as distinguished from the sole interest of these particular parties.

(c) There is no lack of harmony of applicable decisions requiring reconciliation in these cases.

(d) These cases present no questions of general importance essential to the appropriate administration of the system of federal justice. They involve only matters local to the state of New Jersey.

Petitioners' attempt *(p. 21)* to create a conflict of decision between the Third Circuit in these cases and the Eighth Circuit in *Bailey* v. *Megan,* 102 Fed. (2d) 651, is unjustified, because entirely different methods of valuation are prescribed by the laws of New Jersey and South Dakota. In the *Bailey* case it was "conceded" that the formula method of the South Dakota law required a system valuation allocated to that state. The accuracy of the formula factors was the only issue in the case. As hereinafter shown, the New Jersey method, and the issues in these cases, are totally different from those in the *Bailey* case. The terminal situation in New Jersey, later discussed, reverses the problem of the *Bailey* case, as well as of that in *Rowley* v. *Chicago & N. W. R. Co.,* 392 U. S. 102, therein cited.

In the *Bailey* case (decided April 6, 1939) the court relied upon, and followed, the decision in *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, presumably because both cases involved the use of a similar formula method. Consequently, if there is any conflict of decisions it is between the *Great Northern* case and later decision of this Court, rendered May 20, 1940, in *Nashville C. & St. L. Ry. Co.* v. *Browning,* 310 U. S. 362, which are in direct conflict respecting the principles involved in this case. It was doubtless for that reason that, although it was cited by the trial judge *(R. 44),* petitioners did not cite the *Bailey* case in the court below, either in their main brief or in the brief supporting their petition for rehearing *(R. 1823-1888).* It was definitely for that reason that the court below followed the *Nashville* case, rather than the *Great Northern* case *(R. 1800).*

II.

All of the issues here presented are *res judicata.*

This defense was pleaded in the answers *(R. 141-4, 145-8)*, and was sustained by the court below *(R. 1803)*.

All of the present objections, in their various forms, centre on the method of valuation used. The objections based upon the constitution and laws of New Jersey are unavailing here. Unless that method denies petitioners due process of law, there is no federal question presented, or federal court jurisdiction. The purpose of this point is to show that these objections to the method of valuation are *res judicata.*

Review Procedure.

The railroad tax act authorizes an appeal to the State Tax Commissioner from the assessments made by Division of Engineering and Railroad Taxes of the State Tax Department on written complaint "specifying the grounds of complaint and the relief sought". It directs the State Tax Commissioner to sit on a specified date "for the purpose of reviewing his assessments under this act", and to conduct hearings, which he "may adjourn from time to time till he shall have finished the hearings." He is clothed with power to issue subpoenas to compel the attendance of witnesses and the production of books and papers, and to examine witnesses. Such hearings are held on notice to all interested parties, and are conducted as hearings *de novo* and *inter partes.* The appellants are represented by counsel and the state is represented by the Attorney General. The

testimony of witnesses is taken under oath and recorded stenographically. Exhibits are received, and briefs are filed at the close of the hearings. The statute provides that the commissioner "shall review said assessment and correct the same as shall appear just," and that his "final determination" in the form of a "certificate and report", "shall be conclusive and shall have the force and effect of a judgment of a court of record having competent jurisdiction and the proceeding whereon such certificate and report are founded shall not be inquired into" "in any suit or proceeding, except on such complaint before the State Board of Tax Appeals, or on such *certiorari*" in the state Supreme Court *(R. 139-140)*.

The railroad tax act also provides for an appeal to the State Board of Tax Appeals *(R. 108)*, a special tribunal of 5 members, appointed by the Governor and confirmed by the Senate, established by law and clothed with sole and exclusive jurisdiction to hear and determine all questions of fact and law respecting the "validity or amount of the taxes" *(R. 125-130)*. Such appeal is authorized on behalf of any person desiring to contest the final determination of the State Tax Commissioner, on written complaint "specifying the grounds of complaint and the relief sought", and hearings are directed by the statute to be held on five days' notice, at which appellants are represented by their attorneys and the state is represented by the Attorney General *(R. 128-9)*. Such hearings are conducted as a trial *de novo* and *inter partes*.

With respect to the hearings of such appeals the statute empowers the State Board of Tax Appeals as follows:

> "If it shall be made to appear upon such hearing that any such assessment or tax is illegal, excessive, insufficient, or that there has been illegal discrimination in the assessment, the State Board of Tax Appeals shall correct, adjust and equalize the assessment and tax of such property" *(R. 130)*.

Anyone dissatisfied with the judgment of the State Board of Tax Appeals may, upon payment of the taxes "not in substantial controversy", apply to the state Supreme Court for writ of *certiorari* to review all questions of law and fact *(R. 132-133, 230-1)*. Pending that litigation, or any further contest up to and including this Court, contestants are expressly excused from the payment of any disputed taxes.

> "If it shall be made to appear before the Supreme Court on the writ of certiorari that the final determination of the State Board of Tax Appeals in respect to any such assessment or tax in controversy is illegal, excessive, insufficient, or that there has been illegal discrimination in the assessment, the Supreme Court shall correct, adjust and equalize such assessment and tax or refer same back to the State Tax Commissioner who shall correct, adjust and equalize the assessment and tax in accordance with the instructions or decision of the court" *(R. 133)*.

It is the duty of the state Supreme Court to "determine disputed questions of fact, as well as of law." "The court may reverse or affirm, in whole or in part, such tax or assessment" *(R. 230-1)*.

A review of the judgment of the state Supreme Court on all questions of law and fact, is available by an appeal (as of right, with a stay of the collection of disputed taxes)

to the New Jersey Court of Errors and Appeals (the state court of last resort) and a review of its judgment is available in this Court under Section 237 of the Judicial Code *(28 U. S. C. A. sec. 344)*. This course of review of taxes by *certiorari* in the state Supreme Court, by appeal to the Court of Errors and Appeals, and by appeal or *certiorari* in this Court was fully considered and approved in *Hill* v. *Martin*, 296 U. S. 393, 399, 400.

Here, this point divides into two branches—

(a) *Previous cases*—relating to the decisions in the 1933 cases, as applied by the Circuit Court *(100 F. (2d), at page 147)*.

(b) *Present cases*—relating to decisions of the State Board of Tax Appeals in these cases.

(a) Previous Cases.

The assessments and taxes on the property of petitioners, and their lessors, in New Jersey for 1932 were reviewed, in the manner above described, on complaints to the State Board of Tax Appeals, which, after hearing, argument and briefs, entered judgments sustaining the assessments and taxes and dismissing the appeals. Without further proceedings in the state courts to contest the 1932 assessments, petitioners filed complaints in the District Court for the District of New Jersey, similar to those filed in the present cases. Their only significance here is that the 1932 cases were, by stipulation of the parties, heard and determined by the District Court and the Circuit Court of Appeals on the record and issues of the 1933 cases before the State Board of Tax Appeals and the state Supreme

Court. "Complaints identical in character" contesting assessments "made in same manner" form the basis of the present cases *(R. 111)*.

The record reference to *"(R. 111)"* is to the complaint of Central Railroad Company of New Jersey (not a petitioner here), used in the transcript of the record as the basic complaint to avoid repetition of the same allegations of the complaints of the other companies involved in the court below. Since that is the only complaint from which this reference is printed in full in the stipulated record below, and now before this Court, it is necessary to continue that reference. Paragraphs in the same language were contained in the complaints of all of the petitioners, as below indicated:

Petitioner	*Pgf.*	*Record*
Lehigh Valley R. Co.	27	173
D., L. & W. R. Co.	27	156
Erie R. Co.	27	165
N. J. & N. Y. R. Co.	27	180
N. Y. Central R. Co.	27	188
N. Y. & L. B. R. Co.	16	193

The 1933 appeals, on similar complaints, were heard during 20 court days by the State Board of Tax Appeals, which thereafter entered judgments dismissing the appeals on a written opinion officially reported as *Central Railroad Company of New Jersey, et als.* vs. *J. H. Thayer-Martin, State Tax Commissioner,* 57 N. J. Law Journal 115; N. J. Tax Rep. (1912-1934) pages 675-684. Extracts therefrom, including the grounds of complaint, are as follows (page references are to the New Jersey Law Journal).

(pp. 115-6) "The appellants by their petitions bring before us for review the assessments and levies for taxes for the year 1933 upon first and second class property, tangible personal property and franchises. The petitions are similar as to causes of complaint, and for convenience the cases were tried together. This opinion will serve for all of the issues, due allowance being made for certain omissions and manifest errors which have been corrected by consent of the State Tax Commissioner. The corrections are set forth in the Board's judgments.

The assessments were made by the State Tax Commissioner pursuant to the provisions of the Railroad Tax Act (P. L. 1888, p. 269, as amended and supplemented). The causes of complaint can be reduced to three issues, namely:

(1) The method by which the assessments were made;

(2) Regardless of the method of assessment, the franchises and railroad property have been assessed in excess of true value";

(3) Illegal discrimination. (Since this ground was repeated, and decided adversely, in the 1934, 1935 and 1936 cases subsequently discussed and is not an issue now, it will not be repeated.)

* * * * * *

(p. 116) "The Statute does not prescribe any specific method for determining true value. It is obvious, however, that it contemplates a physical valuation of each class of railroad property. The method of determining true value is left to the discretion and judgment of the State Tax Commissioner."

* * * * * *

(p. 117) "This method of valuation has been used in New Jersey since 1876, when the Railroad Tax Act was changed to conform to our Constitution, as amended in 1875. Heretofore no complaints have ever been made by the railroads as to method. They have, however, for a great many years past, frequently appealed to the tax boards and the Courts for relief from injustice and injury in the matter of the levies made on their property for the purpose of taxation. Prior to their appeals for taxes payable in 1931, their complaints were based principally on the claim that the assessments of first and second class property were in excess of true value."

* * * * * *

"Since 1875 the Railroad Tax Act has been before our Courts many times in one form or another. We do not know the exact number of times but are reliably informed that it was in excess of one hundred times. In many of the appeals the present appellants were parties. In most of them, the assessments of railroad property of some or all of the several classes prescribed by statute were under direct attack. In none of these cases has the method of assessment ever been attacked. In many cases it has been expressly approved by the Courts. The Board is of the opinion that after nearly fifty years of judicial construction by the Courts and acquiescence by the petitioners, the present method of assessing and determining true value must be regarded as a settled part of the law of this State."

* * * * * *

(p. 119) "The appeals for 1933 are directed against the method employed by the State Tax Commissioner in making his assessments (which the rail-

roads claim resulted in an excessive valuation of their property) * * *".

* * * * * *

(p. 119) "In attacking the method of assessment used by the State Tax Commissioner, the railroads contend that the true or market value of railroad property should be determined by the market value of the stocks and bonds representing the property, or by their earnings, or a combination of both, over a period of years. The stock and bond method is not the sole criterion of true value. It may be an element in determining true value, but at best it must be considered with other factors."

* * * * * *

(p. 120) "No method of assessment can be devised which will not be subject to criticism."

* * * * * *

(p. 121) "There is no legislative enactment in this State which prescribes the stock and bond or earning method, or both, as the criteria for determining the true or market value of railroad property. In the absence of specific statutory provisions, any method may be used to determine true value."

* * * * * *

(p. 121) "The Board holds that the method employed by the Tax Commissioner meets with its approval."

* * * * * *

(p. 121) "The Board is unanimous in its finding that the method used in making these assessments was proper, and also that the railroad property and franchises have not been assessed above true value."

The judgments of the State Board of Tax Appeals in the 1933 cases were reviewed by petitioners, and the other companies, including those whose property is involved here, on separate writs of *certiorari*, in the State Supreme Court. *Central R. Co.* v. *Martin*, 114 N. J. L. 69, 70. That court reviewed all questions of fact presented in the joint record before the State Board, and all questions of both state and federal law, including the claims of denial of due process of law and equal protection of laws under the Fourteenth Amendment, presented in the complaints to the State Board and the "Reasons" filed in the state Supreme Court. All of the issues were decided adversely to petitioners, and the assessments were sustained.

Following are extracts from the unanimous opinion of the court:

> (p. 71) "Prosecutors, in case number 218 (involving these petitioners), in their oral argument, as well as on their briefs, further reduce the issues to two questions: 'First, with respect to the ascertainment of the true value of property used for railroad purposes; and, second, with respect to the equality of the assessments levied on railroad property and other property.'"
>
> * * * * * *
>
> (pp. 73-4) "The proof is clear that the provisions of the statute have been observed. Mr. Louis Focht, a civil engineer since 1884, has been identified with the branch of the state department in charge of the detail work incident to the making of the assessments since 1898; he is the chief engineer of the division of railroad valuation and taxes; he was formerly employed by the Lehigh Valley Railroad Company of New Jersey for about sixteen years as

a division engineer; and he has walked every foot of railroad in this state. He was called and testified as a witness for the prosecutors and respondents. He said that the method employed in the making of the instant assessments, and herein complained of, is the method that has been employed in this state since 1884. This is the first time that an attack has been centered and directed against it.

The problem of railroad taxation is not unlike all other problems of taxation; it is a troublesome one. This is so in normal times; and it is especially so during these present economic disturbances and the period of extraordinary transportation problems through which railroads are now passing. The contest between the taxing authorities of the state and the prosecutors has been a continuous one; the end thereof is not made to appear.

Thus, notwithstanding that this contest has been waging for almost fifty years; and that almost every possible phase of this litigious question has been brought to our courts (it is estimated that it has been so brought in excess of one hundred times) and received their consideration, it is not at all surprising that the prosecutors should, at this late stage of the contest, challenge the method employed and so firmly established in the making of these assessments."

* * * * * *

(p. 74) "And, it is argued that the effect of the act as amended in 1888, 'is to require the whole railroad to be valued as a whole and as a railroad, and the proportionate value of (the) four general elements then ascertained for the purpose of distributing the tax.'

The legislative mandate as to the distribution of taxes levied on second class property (*Pamph. L.*

1918, pp. 1078, 1081, and its supplements and amendments thereto) is a very persuasive factor in support of the method or procedure followed. And, it would seem to us that it is far from a satisfactory answer thereto to say that if and when the taxes levied, on the method proposed, and hereinafter referred to, by prosecutors, are paid there can be a division of those taxes on some arbitrary percentage basis, to meet and comply with the legislative provisions as to its distribution."

* * * * * *

(p. 75) "For the respondents it is strongly urged in substance, that the methods followed and the factors considered, as indicated, is basically, traditionally and legally sound; they are productive of the 'true value' of the prosecutors' properties. This, we think, is so."

* * * * * *

(p. 77) " 'The objection that the property of railroads by this law is not assessed by taxes according to its true value, because it can only be truly valued as an entirety, and not in parcels, as provided for in the act, is not well taken. The method of determining the true value of property must be left to the discretion of the legislature. If this value is fixed as the basis for taxation, the method and agencies to be used to ascertain it, belong to the legislative, and not the judicial, province.' (Quoting from *State Board* v. *Central R. Co.*, 48 N. J. L., 146, 292.)

Thus, as indicated, in the absence of statutory enactment to the contrary, it is nothing new to say, as it has been frequently said before, that valuing railroad property for taxation is not a formulaic process."

* * * * * *

(p. 78) "The board, as stated in its opinion, clearly set forth the method employed and the various factors which it considered in reaching its conclusions. If we are at all concerned with the method or formulas so employed, as long as the sum it declared to be due is based on the true value of prosecutors' properties (*Central Railroad Co.* v. *State Board of Assessors,* 49 N. J. L. 1—at p. 8), we are of the opinion that the methods employed and the factors considered by the board were fairly inclusive; they were sound, fair and reasonable. It appears to us that they truly form, under the proofs herein submitted, a practical, sound, fair and legal basis for the result reached. The practical construction given to the law by the board for nearly half a century on which it reached its conclusions is strong evidence that it is right. It has become the firmly rooted, established and fixed law applicable thereto. It cannot, under these circumstances, be changed by or through the judicial branch of our government. The relief, if any, prosecutors are entitled to have in the premises, must come, if at all, by or through the legislative branch of our government. This we think is the well settled law." (Quoting from *Wright* v. *Central of Ga. R. Co.,* 236 U. S. 678; *Wisconsin* v. *Illinois,* 278 U. S. 367, 413; *United States* v. *Dakota Mountain Oil Co.,* 288 U. S. 459; *Mass. Mut. L. Ins. Co.* v. *United States,* 288 U. S. 269).

* * * * * *

(p. 79) " 'The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provisions, without material change'."

* * * * * *

(p. 80) "In the case of *Wright* v. *Central Georgia Railroad Co., supra* (at p. 681), Mr. Justice Holmes said, 'the court cannot take the place of the taxing power'."

* * * * * *

(p. 81) "The writs of *certiorari* * * *, are dismissed, with costs."

The above review of that decision demonstrates how inadequately petitioners have treated it, and in total disregard of the undisputed fact that the same claim, there as here, relates to the controlling issue of the validity of the method used, in Point VI of their supporting brief *(pp. 31-3)*.

No appeal was taken from the judgments of the state Supreme Court dismissing the writs, but petitioners then filed complaints in the District Court for the District of New Jersey "identical in character" with those in the present cases *(R. 111)*.

By stipulation of the parties the 1932 and 1933 cases were heard together in the District Court on the printed record of the 1933 cases before the State Board and the state Supreme Court. All of the same issues of fact and law presented by petitioners were decided by the District Court adversely to petitioners, and decrees dismissing the complaints *(Lehigh Valley R. Co.* v. *Martin,* 19 Fed. Supp. 63) were affirmed by the Circuit Court, 100 Fed. (2d) 139. Petitions for *certiorari* were denied (306 U. S. 651), as were petitions for rehearing (306 U. S. 669-670).

These decisions are not mentioned by petitioners in their discussion of the *res judicata* issue *(Point VI, pp. 31-3)*.

(b) The Present Cases.

Timely complaints were filed with the State Tax Commissioner, and proceedings, as above described were heard, on behalf of each of the 44 separate railroad companies whose taxes were involved in these cases, including petitioners, for the review of their assessments for the years 1934, 1935 and 1936, respectively. All of those complaints alleged the same general grounds; viz.:

(a) The assessments were excessive.

(b) The assessments were made upon erroneous principles, without consideration of the extent of use (earnings) of the property.

(c) Illegal discrimination (not in issue here).

The relief sought was stated in the form of specific valuations for each of the years, which the State Tax Commissioner was requested to substitute for the assessments complained of, respectively.

In each instance, the State Tax Commissioner filed his conclusions, sustained the assessments in question, and served upon all parties his "certificate and report", accordingly.

Petitioners, and the other companies above referred to, then appealed to the State Board of Tax Appeals, in each of the three years here involved, and said appeals were heard in formal trials *de novo, inter partes,* conducted under pleadings and procedure above described, and in accordance with the accepted rules of evidence *(R. 125-130).*

In the 1934 cases joint hearings on all the appeals were held during 52 court days. The record consisted of 7,783

pages of testimony and 343 exhibits. All of the questions of law and fact were discussed, without limitation of time, in oral arguments and printed briefs submitted by both sides. The opinion, officially reported under the caption of *Central Railroad Company of New Jersey, et als., Appellants* v. *J. H. Thayer Martin, State Tax Commissioner, Respondent,* N. J. Tax Rep. (1934-9) pages 82-7, decided all of the appeals. The questions involved and the conclusions of the Board were stated, in part, as follows:

> (p. 83) "The grounds of appeal fall into three classes, namely:
>
> (1) That the property was assessed in excess of true value.
>
> (2) That the method of valuing the property was erroneous and improper."
>
> (3) Illegal discrimination—(not in issue now).
>
> (p. 84) "The statute does not prescribe any specific method for determining the value of railroad property. The method used by the Tax Commissioner in valuing such property is the same method that has been used for many years, and which was the subject of appeal for taxes payable for the year 1933."
>
> • • • • • •
>
> "In the case of the *Central Railroad Company of New Jersey, et als.,* v. *J. H. Thayer Martin, State Tax Commissioner,* 114 N. J. L. 69, 175 Atl. 637, the Supreme Court, after reviewing the subject at length, determined that the method used in valuing railroad property for taxes payable for the year 1933 (which method is identical with that used for taxes payable for the year 1934) was a proper method of valuing

this class of property. This Board is bound by the decisions of the Supreme Court and cannot establish a convellent rule."

The joint hearing of the 1935 appeals occupied 30 court days. The record consisted of 3,442 pages of testimony and 220 exhibits. Oral arguments were heard and printed briefs were filed. The written opinion is officially reported under the caption of *Central Railroad Company of New Jersey* (and other named companies), *Appellants* v. *J. H. Thayer Martin, State Tax Commissioner, Respondent,* N. J. Tax Rep. (1934-9), page 231. The questions involved and the Board's conclusions are, in part, as follows:

(p. 231)

"The grounds of appeal fall into three classes, namely:

(p. 232)

(1) That the method of valuation was not a lawful method.

(2) That the valuations were excessive."

(3) (Illegal discrimination, same as in 1934 cases.)

* * * * * *

"The appellants contend that the entire railroad system should first be valued as a unit, and the proportionate values of the various classes of their property in New Jersey then ascertained. The method of valuation used by the taxing authorities has been approved by the New Jersey Supreme Court in the case of *Central Railroad Company of New Jersey, et al. v. Martin, State Tax Commissioner, et al.,* 114 N. J. L. 69, 175 Atl. 637. This Board is bound by that determination.

The claim of excessive valuation arises by reason of the method of valuation used, the railroads contending that the use of another method, such as stock and bond values, or capitalized earnings over a period of years, or a combination of both, would produce the true valuation. These matters were also considered by the Supreme Court in the case above mentioned and were decided adversely to the appellants.

With respect to illegal discrimination, the complaint is predicated upon a claim that the taxing authorities failed to take into consideration the decline in earnings of the railroad systems and the decrease in the value of their stocks and bonds. When stripped of surplusage, this contention directs the complaint to the method of valuation. There is no proof of any systematic or illegal discrimination in the valuation of railroad property as compared with the general mass of taxable property in this State. Under the statutes of New Jersey, the value of the stocks and bonds and the earning capacity of the railroads need not be taken into consideration; however, the proofs show that these elements were considered. The appellants have failed to carry the burden of proof to show that the valuations were excessive, illegal or discriminatory.

The appeals are dismissed."

The joint hearing of the 1936 appeals occupied 4 court days. The record consisted of 422 pages of testimony, and 138 exhibits were offered in evidence. Since the grounds of complaint, the relief sought, the method of valuation by which the assessments were made, and the questions of law, were the same, and the proof was similar in character and effect, in the 1936 cases as those presented by petitioners,

and others, and decided against them, on the trial of their 1933 appeals *(Central R. Co.* v. *Martin,* 57 N. J. L. Journal 115; N. J. Tax Rep. (1912-34), p. 675; affirmed by state Supreme Court 114 N. J. L. 69), and in their 1934 and 1935 cases, the Board entered judgments dismissing the appeals, without filing another written opinion.

The New Jersey courts have invariably held that the functions and powers of the State Board of Tax Appeals *(Lawrence Township* v. *State Board,* 124 N. J. L. 465, 467), the State Board of Assessors (predecessor of the State Tax Commissioner, *R. S. 54:1-1) (Central R. Co.* v. *State Board,* 49 N. J. L. 1, 9), and similar statutory special tribunals, are judicial in character, *Obert* v. *Hammel,* 18 N. J. L. 73, 78-80; *Thompson* v. *Board,* 57 N. J. L. 628, 630; *Riddle Co.* v. *New Auditorium Pier Co.,* 78 N. J. L. 520, 523; *Roebling's Est.,* 91 N. J. E. 72, 74; *Hewson* v. *Newark,* 95 N. J. L. 28, 29; *Bugbee* v. *Van Cleve,* 99 N. J. E. 825, 834-5.

Two of those cases were decided by the Court of Errors and Appeals (the highest court in the state) and five of them were decided by the New Jersey Supreme Court. The familiar rule that decisions of the highest court in the state are controlling in the federal courts on questions of state law has been extended by this court to decisions of the New Jersey Supreme Court, *Erie R. Co.* v. *Hilt,* 247 U. S. 97; *Erie R. Co.* v. *Duplak,* 286 U. S. 440; *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 178-180.

The judicial quality, and binding influence, of the decisions of such special tribunals have been recognized by this court in *Pittsburgh C. C. & St. L. Ry. Co.* v. *Backus,* 154 U. S. 421, 434-5 and, particularly, in *City Bank Farm-*

ers Trust Co. v. *Schnader,* 291 U. S. 24, where the procedure and jurisdiction of the Pennsylvania Orphans Court was substantially the same as those of the State Board of Tax Appeals in these cases. On December 9, 1940, three opinions were delivered holding that the federal courts are bound, respecting questions of state law, by the decisions of intermediate state tribunals, having jurisdiction similar to that of the State Board of Tax Appeals in New Jersey. *West* v. *Am. T. & T. Co.,* 311 U. S. 223, 236-237; *Six Companies* v. *Joint Hy. District,* 311 U. S. 180, 188; and *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 178-180.

Petitioners had, but did not pursue, further independent judicial reviews of all questions of law and fact, without the necessity of paying any part of the disputed taxes, in the state courts, as above described. That course was pursued by some of petitioners in their contest of railroad taxes levied for the year 1931. *Central R. Co.* v. *State Tax Dept.,* 109 N. J. L. 395; aff. 112 N. J. L. 5; Cert. denied 293 U. S. 568.

It was within the lawful power of the state to prescribe the above mentioned exclusive remedies for review of assessments and taxes through the state courts. *Burrill* v. *Locomobile Co.,* 258 U. S. 34, 36-9; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 342-3; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 404.

Instead of pursuing their remedies through the state courts and in this Court, petitioners filed complaints in the District Court, for the District of New Jersey, in suits against respondents, named only in their official capacities as state officers, praying for preliminary and final injunctions to restrain them from attempting to collect the un-

paid balances of taxes levied for the years 1934, 1935 and 1936, respectively, not only against themselves and other companies not petitioners here, but also, those levied against 36 other railroad companies who were not parties to these suits, as mentioned above in the Statement of Case.

Same issues here.

The reasons why petitioners did not apply to the state Supreme Court for writs of *certiorari* to review the judgments of the State Board of Tax Appeals in the 1934, 1935 and 1936 cases are stated in their 1934 complaints, as follows:

> " * * * that while the railroad tax act provides for a review of such assessments by the Supreme Court of New Jersey on *certiorari,* recourse to that Court and proceeding would be futile and unavailing to plaintiff under prior decisions of said court on complaints identical in character with those hereinabove set forth. The assessment of said property of plaintiff's system for the year 1934 was made in the same manner as the assessment thereon for the year 1933, which was sustained by the State Board of Tax Appeals and the New Jersey Supreme Court after review at the instance of the plaintiff on complaint and *certiorari,* respectively, the State Board and the State Court having thereon sustained the above described method of assessment adopted by the State Tax Commissioner. * * * By reason of said decision of the Supreme Court of New Jersey on the assessments for the year 1933, plaintiff and the other companies mentioned are foreclosed from any relief in or by the said court on *certiorari* in respect of the excessive, discriminatory and illegal assessments and taxation of their property for the year 1934." *(R. 111-112.)*

Corresponding allegations appear in the complaints of each petitioner for each of the three years, as above indicated under sub-heading (a) of this point. The essential parts of this allegation (except the futility of recourse to the state Supreme Court) were admitted in the answers *(R. 139-140)*, and the undisputed testimony of the state officer who made these assessments, and who has made all such assessments each year since 1898, was that the assessments for 1933, and for each of previous years since 1884, were made in exactly the same manner, and by the same method, as those used for 1934, 1935 and 1936 here in question *(R. 1418-1419, 1453)*.

Similar pleas of *res judicata* in the 1932 cases were sustained by the Circuit Court, *Lehigh Valley R. Co.* v. *Martin*, 100 Fed. (2d) 139, 147.

Notwithstanding the above quoted admission in the complaints, and the previous decision of the Circuit Court, which he quoted in his opinion, the District judge overruled those pleas in these cases *(R. 18-24)*, but they were again sustained by the Circuit Court *(R. 1803)*.

The issues previously decided.

Throughout the entire litigation of the assessments for 1932, 1933, 1934, 1935 and 1936 no question has been raised respecting the validity of the tax laws under which the assessments were made, or of the tax rates, or the method by which those rates were applied. The grounds of objection, before the State Tax Commissioner, the State Board of Tax Appeals, the state Supreme Court, the District Court and the Circuit Court, all related to the method used in ascertaining the true value of the several classes of property

assessed, except the claim of illegal discrimination which has been urged and decided adversely, throughout petitioners' contests of their assessments each year since, and including 1931 but, since that issue was decided adversely to petitioners in these cases by the District Court *(R. 72)* and they did not appeal from that part of the decision, it was not argued or presented before the Circuit Court *(R. 1796-7, 1799)*. Petitioners concede *(R. 111)* that the same grounds of complaint formed the basis of the petitions for *certiorari*, and for rehearing, denied by this Court in *Lehigh Valley R. Co.* v. *Martin* (and 8 other cases) 306 U. S. 651, 669-670.

The doctrine of res judicata.

The parties, the method of valuation and the statutes under which they were made and the taxes were levied, the subject-matter, the legal questions, and every other factor essential to this doctrine, in these cases and in the 1932 and 1933 cases are identical. The only differences are in non-essential factors; viz., the assessments are for different years and the records differ, not in the character, but in the identity of some, of the witnesses and evidence presented.

The doctrine precludes reconsideration, not only of all questions actually decided, but also of all questions that could have been raised and rights thereunder, *Chicot Co. Dr. Dist.* v. *Baxter State Bank*, 308 U. S. 371, 375, 378, (rehearing denied, 309 U. S. 695), and all proof or other admissible matter which the parties, exercising reasonable diligence, might have brought forward at the time of trial, *Southern Pac. R. Co.* v. *United States*, 183 U. S. 519, 528, 533; *Bates* v. *Bodie*, 245 U. S. 520, 526-7; *Baltimore S. S. Co.*

v. *Phillips,* 274 U. S. 316, 319; *Grubb* v. *Pub. Utilities Com.,* 281 U. S. 470, 475; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 402.

The real question here is the applicability of the doctrine to conclude the parties in a subsequent proceeding upon the determination of the same questions in earlier decisions of the same controversy between the same parties. The conclusions of the Circuit Court are sustained by the decisions it cites *(R. 20, 1803),* and *Forsyth* v. *Hammond,* 166 U. S. 506, 515; *Chicago Cemetery Assn.* v. *United States,* 19 Fed. Supp. 228; *Ashwander* v. *Tenn. Val. Authority,* 19 Fed. Supp. 190 (referring to a previous decision in 14 Fed. Supp. 11; 297 U. S. 288).

In *Baldwin* v. *Iowa T. M. Assn.,* 283 U. S. 522, 525, the point of this doctrine was stated as follows:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties."

A similar expression of the point appears in *Stoll* v. *Gottlieb,* 305 U. S. 165, 172.

Application to these cases.

In the present cases a large amount of public revenue has been withheld from its purposes, and the state and municipal governments have been struggling under resulting budgetary deficits. These taxes have been in litigation since June of each of the years for which they were levied; 1934 for 6½ years, 1935 for 5½ years, and 1936 for 4½ years.

If the doctrine of *res judicata* does not apply to preclude, in the contest of taxes for one year, a readjudication of the same issues decided in a contest between the same parties of like taxes for previous years, such contests, on the same grounds, may be renewed each year *ad infinitum*, and no decision of given issues will ever be conclusive beyond the taxes for the individual year directly involved in each case. By this method limitless cumulative amounts of state revenue may be continuously withheld by injunctions while each year's cases successively (and simultaneously) pass through a weary and prolonged litigation.

As shown in this point, and in Point III, the same method of valuation has been sustained by the Court of Errors and Appeals and the Supreme Court of New Jersey, over the same objections as here, as made in conformity with the constitution and laws of New Jersey. One decision of the District Court for the District of New Jersey and two decisions of the Circuit Court of Appeals, Third Circuit, have held that assessments made by that method did not violate any rights under the federal constitution.

The circumstances set forth in this point emphasize the need for applying in these cases the above mentioned "public policy" to prevent interminable and recurrent re-threshing of old straw and the resulting paralysis of public revenues and of the proper functioning of state and local government in New Jersey.

No new issues are presented in this petition, and those presented are *res judicata*.

III.

No federal question is presented.

The Circuit Court correctly held that the only federal question presented by petitioners was whether the collection of the taxes in controversy would deprive petitioners of their property without due process of law *(R. 1799-1801)*.

The property is physically located within the State of New Jersey and its assessed value was used as the measure of taxes levied against the owner *(State, N. J. S. R. R. Co.* v. *Railroad Commissioners,* 41 N. J. L. 235, 245, 248) levied directly, and individually, against 44 separate domestic corporations who are the owners thereof, except four of the petitioners who are foreign corporations operating in New Jersey under legislative permission subject to the tax laws of the state under which all railroad property therein is taxed *(P. L. 1906, p. 266)*, for their contributions, respectively, to the support of state and local governments. All questions respecting the amount of the assessments, the methods used to ascertain valuations for taxation, and the tax rates applied to produce the amount of the taxes, are questions which arise under, and are controlled by, unchallenged provisions of the state constitution and laws.

In addition to the federal question above stated, petitioners claim that that method violates the constitution and laws, and is contrary to certain decisions of the courts, of the State of New Jersey. It was principally upon the latter ground that the assessments were condemned by the District Judge *(R. 54-66)*. The federal ground was urged by petitioners, and accepted by the District Judge, solely be-

cause of the alleged failure of the assessor to give *greater* consideration than he did to earnings, or to regard them as the *controlling* element, in the valuation of property for taxation.

For support of this earnings phase, petitioners, and the District Judge, relied chiefly *(R. 66-8)* upon this court's decision in *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, which was sharply restricted, if not overruled, in *Nashville, C. & St. L. Ry. Co.* v. *Browning,* 310 U. S. 362, 371.

The Fourteenth Amendment was not intended to compel a state to adopt "mathematical exactitude" *(Illinois Central R. Co.* v. *Minnesota,* 309 U. S. 157, 161), or an "iron rule", in the taxation of property, or to control a state in the exercise of its recognized discretionary powers with respect to levying and collecting its public revenues. In taxation, even more than in other fields, legislatures possess the greatest freedom and their power over taxation is complete. The presumption of constitutionality of state tax laws, and of their administration, can be overcome only by the most explicit demonstration to the contrary. The burden is on petitioners to negative every conceivable basis which might support it, *Madden* v. *Kentucky,* 309 U. S. 83, 87-8, 93.

Only federal questions are open for consideration in the federal courts and the question of due process of law (the only federal question here presented) was fully decided against petitioners' present contentions in *Nashville, C. & St. L. Ry. Co.* v. *Browning,* 310 U. S. 362, 364, 369-70.

It is clear, as shown under Point II, that procedural standards adequate and appropriate for the purpose of re-

viewing assessments and taxes are provided by the state laws (*Chambers* v. *Florida,* 309 U. S. 227, 236). Where an opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law, *Illinois Cent. R. Co.* v. *Minnesota,* 309 U. S. 157, 165. This court will assume that the New Jersey courts will protect petitioners in every constitutional right they possess. *Minnesota* v. *Probate Court,* 309 U. S. 270, 277.

The act did not specify, or limit, the method to be used in ascertaining such true value; on the contrary, it expressly delegated to the assessor the broad legislative discretion to choose his own method by expressly empowering him to use his own "personal knowledge and judgment as to the value of property" *(P. L. 1884, p. 159).* In referring to this power, the Chief Justice of the New Jersey Supreme Court said (1886):

> "* * * it is not to be overlooked that the statute in question expressly declares that these assessors 'shall be entitled to use their personal knowledge and judgment as to the value of the property', a capacity with which this court is not endowed by the legislature." *Central R. Co.* v. *State Board,* 49 N. J. L. 1, 9.

The state officer charged with the duty of making the assessments when the act of 1884 went into effect continued the method previously in use. *Central R. Co.* v. *Martin,* 57 N. J. L. J. 115, 116-7, N. J. Tax Rep. (1912-34) pp. 675, 676; *Central R. Co.* v. *Martin,* 114 N. J. L. 69, 74. The same broad discretion was repeated in the act of 1888 *(P. L. 1888, pp. 276-7)* and, again, in the revised statutes of 1937 *(R. S. 54:26-4) (R. 140),* and has, therefore, continued,

without amendment or interruption, with the emphasis of repetition, over a span of 54 years.

The uncontradicted testimony of the state officer who has performed the duties of assessor in the State Tax Department (and its predecessor bodies) continuously since 1898, shows that the same method of valuation has been used continuously since 1884, and was used in making the assessments for 1933 and those in question here *(R. 1418-19, 1453)*.

Many decisions of this court have held, as did the New Jersey Court of Errors and Appeals in 1886 (*State Board* v. *Central R. Co.*, 48 N. J. L. 146, 287-8, 292, 308, 328, 329, 336, 338) and the state Supreme Court in 1934 (*Central R. Co.* v. *Martin*, 114 N. J. L. 69, 77) respecting this precise question, that methods of taxation, and of determining the true value of property for that purpose, must be left to the discretion of the legislature, and that it is not the function of the courts to substitute their judgments for those of the legislature or its duly constituted and authorized administrative agents. *Taylor* v. *Secor*, 92 U. S. 575, 604; *Salomon* v. *State Tax Commission*, 278 U. S. 484, 491.

Recent expressions of this principle are as follows:

> "In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we displace the tax officials' judgment with our own. Certainly we cannot say that the combined judgment of Commission, Board, and state courts, is baseless." *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 310 U. S. 362, 365-6.

"A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

"It is not for the Federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better." *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 580-1, 584.

"Nothing in the Constitution warrants a rejection of these expert conclusions, nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen state authorities. For its own good reasons Texas vested authority over these difficult and delicate problems in its Railroad Commission. Presumably that body, as the permanent representative of the state's regulatory relation to the oil industry equipped to deal with its ever-changing aspects, possesses an insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals. Indeed, we are asked to sustain the district court's decree as though it derived from an ordinary litigation that had its origin in that court, and as though Texas had not an expert Commission which already had canvassed and determined the very issues on which the court formed its own judgment. For it appears that the court below nullified the Commission's action without even having the record of the Commission before it. When we consider the limiting conditions of litigation—the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special com-

> petence of lawyers—it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses." *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 85 L. ed. Adv. op. 321, 323. (Second case.)
>
> See also *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394.

The act of 1884 was challenged by petitioners (and others) in their contest of the first taxes levied thereunder in *State Board* v. *Central R. Co.*, 48 N. J. L. 146, decided in 1886. On the question of the method used by the assessor for ascertaining the true value of the property for 1884 under that act, the Court of Errors and Appeals (in that case) held that "The mere machinery by which taxes shall be assessed or collected is left in legislative discretion" *(p. 338)*; that—

> "If this value is fixed as the basis of taxation, the method and the agencies to be used to ascertain it, belong to the legislative and not to the judicial province" *(p. 292)*;

and that

> "* * * the act of 1884 introduced no novelty in railroad taxation, but that on the contrary the same method, substantially, of taxing railroad companies had existed from 1873, under the act of that year, * * *" *(p. 276)*.

The Court sustained that method of ascertaining true value by a vote of eleven to one *(p. 356)*.

Every objection, under both state and federal constitutions or laws, to the assessments and taxes which they have urged in these cases were urged and argued by petitioners, and decided against them, by the highest state court, in that case.

It is established that the present method of valuation of railroad property has been used continuously, at least, since 1873. Notwithstanding that fact, presumably within its knowledge, the legislature did not prescribe another method, or restrict the assessor in the continued use of that method, in the act of 1884, the revision of 1888 *(P. L. 1888, p. 269)*, or in any of the forty other amendments or supplements enacted during the 67 annual sessions of the legislature since 1873, including the complete revision in 1937 *(Revised Statutes, 1937, Title 54, Part 4)* which repeated, as did the act of 1888, the same broad powers of judgment and discretion contained in the 1884 act.

That method was not again challenged, or any of the present objections urged, by petitioners (or others) until the contest of their 1933 assessments, when the State Board of Tax Appeals *(Central R. Co.* v. *Martin,* 57 N. J. L. J. 115, 116-7, N. J. Tax Rep. (1912-34) 675) and the State Supreme Court *(Central R. Co.* v. *Martin,* 114 N. J. L. 69, 73) reviewed the history of, and sustained the assessments made according to, that method, (as petitioners concede) "on complaints identical in character" with those in the present case *(R. 111)*. These decisions are discussed under Point II.

The fact that petitioners acquiesced, without objection, in the use of this method of valuation from the time of

the Court of Errors' decision in 1886 to 1933, although they, or some of them, had contested their taxes on other grounds in more than a hundred intermediate reported cases, was noticed by the state and federal courts in their decisions in the 1932 and 1933 cases, *Central R. Co.* v. *Martin,* 114 N. J. L. 69, 73; *Lehigh Valley R. Co.* v. *Martin,* 19 Fed. Supp. 63, 66.

On the identical record before the state Supreme Court in the 1933 cases, the Circuit Court of Appeals held that "the methods of assessment and valuation employed in the case at bar have received the sanction of the Courts of New Jersey and are now firmly embodied in its laws." *Lehigh Valley R. Co.* v. *Martin,* 100 Fed. (2d) 139, 143.

In the present cases the Circuit Court held—

> "* * * Furthermore we think it clear that these methods of valuation do conform to the New Jersey laws. They have been followed by the taxing authorities of that state for more than fifty years * * *". (*Central R. Co.* v. *Martin,* 115 Fed. (2d) 968, 971.)

Petitioners' argument in support of this application is extended in the record by the inclusion of forty pages of the argument in support of the petition for rehearing in the court below *(R. 1848-1888).* While that brief, by rights, is *functus officio,* nevertheless, since petitioners have incorporated it in the record, it cannot safely be disregarded in this opposing brief.

Two of the "matters involved" set forth in petitioners supporting brief *(p. 2)* and later discussed therein, are here stated, and considered, as follows:

(a) Valuation of Land.

That railroad land is valued "on the basis of the value of non-railroad contiguous lands". The same objection was urged by petitioners in their 1932 cases, and overruled by the District Court, *Lehigh Valley R. R. Co.* v. *Martin,* 13 Fed. Supp. 63, 65, and by the court below on appeal, 100 Fed. (2d) 139, 142. This claim is a distortion of the evidence in these cases *(R. 1447).*

(b) Valuation of Structures.

That railroad improvements are valued "on the basis of estimated original costs less physical depreciation". This objection was also urged by petitioners, in their 1932 cases, and overruled by the District Court and the Circuit Court at the citations above given. The error of this claim is demonstrated in this record *(R. 1377, 1429, 1430, 1432, 1435, 1446, 1447, 1449, 1450, 1454, Ex. D-114).*

In the present cases both of these objections, (a) and (b), were overruled by the court below on the ground that they presented questions solely of state law *(R. 1798).*

In the petition for rehearing in the court below, this objection was included in the matters which they did *not* question:

> "1. The question whether the assessments are in conformity with New Jersey statutes and the New Jersey constitution are not before this Court" *(R. 1849).*

If it were necessary for a federal court to decide these two objections, it would follow the decisions of the state courts.

When objections (a) and (b) were first raised by petitioners in the contest of their assessments and taxes for 1884, the Court of Errors and Appeals (the highest state court) said:

> "The method of determining the true value of property must be left to the discretion of the legislature. If this value is fixed as the basis of taxation, the method and the agencies to be used to ascertain it, belong to the legislative and not to the judicial province" *State Board* v. *Central R. Co.*, 48 N. J. L. 146, 292.

That language was quoted and followed by the state Supreme Court in petitioners' contest of their 1933 taxes *Central R. Co.* v. *Martin*, 114 N. J. L. 69, 77, and it held that "The proof is clear that the provisions of the statute have been observed" *(p. 73)*. In their complaints, petitioners concede that the assessments in the present cases were made by the same method, and in the same manner, as those for 1933, sustained by the state Supreme Court in that case *(R. 111)*. In addition to being settled by state law, those two objections are *res judicata* under the decisions of the state Supreme Court in the 1933 cases, and the decisions of the District Court and the court below in the 1932 cases, for reasons above stated in Point II.

The third, and chief, objection urged by petitioners, the alleged disregard of earnings in the assessments in question, requires a discussion so extended as to give it separate consideration hereafter in point VII.

In *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 310 U. S. 362, this court had under review railroad tax assessments

made under "a practice, systematic, unbroken for more than forty years", *(p. 369)*. It held—

> "It is not the Fourteenth Amendment's function to uproot systems of taxation inseparable from the state's tradition of fiscal administration and ingrained in the habits of its people" *(p. 370)*.
>
> "* * * If the discrimination of which the Railway complains had been formally written into the statutes of Tennessee, challenge to its constitutionality would be frivolous. If the state supreme court had construed the requirement of uniformity in the Tennessee Constitution so as to permit recognition of these diversities, no appeal could successfully be made to the Fourteenth Amendment." *(p. 369.)*

By the same reasoning, if the New Jersey statutes had expressly prescribed the present method of valuation for the taxation of railroad property, and had expressly stated that declining earnings should not be considered *at all*, no violation of the Fourteenth Amendment would result, any more than results from the statutory provision for taxing the capital stock of non-railroad corporations on the par value of outstanding capital stock, regardless of its market value or the earnings of the company *(N. J. S. Anno., section 54:13-6)*, or for taxing other public utilities on the basis of gross receipts, regardless of net earnings *(N. J. S. Anno. section 54:13-15)*.

The mere amount, or volume, of the taxes gives no federal jurisdiction. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 64. In the absence, as here, of any claim that petitioners are required to contribute an unfair proportion of the public revenue, there is no federal question presented.

IV.

The judgments of the District Court restrained proceedings in a State Court, in violation of Section 265 of the judicial code.

The Circuit Court held *(R. 1801-2)* that the judgments of the District Court violated section 265 of the Judicial Code by restraining proceedings provided by statute *(R. 135)* in the state Supreme Court for docketing judgment and issuance of execution for the collection of these taxes pursuant to the judgments of the State Board of Tax Appeals.

In addition to the decisions cited by the Circuit Court *(R. 1802)*, its conclusion on this point is sustained by *Ke-Sun Oil Co.* v. *Hamilton*, 61 Fed. (2d) 215, 218; *Taylor* v. *Secor*, 92 U. S. 575, 613-614.

The case of *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 182, relied upon in petitioners' supporting brief *(p. 25)* in opposition to the conclusion of the court below on this point, was cited by them on page 15 their main brief and at page 44 of their brief on petition for rehearing *(R. 1871)*. The court below properly held that decision to be inapplicable here, for obvious reasons:

(a) It relates only to "enjoining the institution in the State courts of proceedings to enforce local statutes *which are repugnant to the Constitution of the United States*" (italics ours). In the present cases no statute is alleged to be "repugnant to the Constitution of the United States".

(b) At the time of the institution of the collection proceedings in the state Supreme Court, hereinafter mentioned, no federal court had any "subsisting" jurisdiction over the subject-matter to maintain or protect, or that was threatened with frustration, defeat or impairment "through proceedings in the state courts."

(c) At that time there was no "party" threatened with deprivation "of the benefit of a judgment obtained in a state court in circumstances where its enforcement" would have been "contrary to recognized principles of equity and the standards of good conscience."

The claim that section 265 does not apply until "proceedings in a state court" has "actually commenced", is precisely the same as the claim made, and expressly overruled, in *Hill* v. *Martin,* 296 U. S. 393, 401.

Prior to the institution of any of these suits petitioners had had two formal and complete hearings *de novo* in proceedings *inter partes* on written complaints, and on due notice, for the review of the assessments on all questions of law and fact, and the validity and amounts of the assessments and taxes had been established by judgments, as above described in Point II. The taxes were then due and payable.

Since the State Board of Tax Appeals, like other appellate tribunals, lacks the power to issue executions for the enforcement or satisfaction of its own judgments, it is necessary, as in the case of money decrees in the courts of equity, to prosecute supplementary, or ancillary, proceedings for docketing them in the state Supreme Court where execution can be issued and satisfaction obtained. For that purpose the railroad tax act provides *(R. 135):*

> "That if any tax * * * shall remain unpaid in whole or in part for ten days after the expiration of the time limited for payment thereof, it shall be the duty of the attorney general to apply forthwith to a justice of the Supreme Court for an order that said tax and the interest due thereon * * *, shall be made a record of the Supreme Court, and a judgment shall be entered therefor in the name of the State of New Jersey as plaintiff against said company, * * * as defendant, * * *; the attorney general shall also apply for an order that execution forthwith issue on said judgment, * * *; the said orders shall be respectively applied for on five days' notice to the company * * *, which notice, * * * shall be served in the same manner as a summons is directed by law to be served upon a corporation * * *."

No application for *certiorari* having been made by petitioners to review the judgments of the State Board of Tax Appeals sustaining the final determination of the State Tax Commissioner respecting the assessments and taxes for the years 1934 and 1935, respectively, within the time prescribed by law, proceedings were instituted by the Attorney General by the service of notice in the manner provided by the above quoted law. In those proceedings and before the same judge, petitioners could have applied for, and obtained, writs of *certiorari* to review their taxes. The pendency of those proceedings is admitted in the complaints *(R. 109-10, 214)*, and alleged as the basis of petitioners' claims of a denial of due process of law, lack of adequate remedy at law, and for injunctive relief *(R. 110, 214-15)*. The threat of such proceedings was the basis of similar allegations and prayer in the 1936 complaints *(R. 332)*.

Petitioners have not questioned the constitutionality of the laws prescribing, the statutory *duty* of the Attorney General to institute, or the regularity or form of, such proceedings.

The proceedings in the state Supreme Court was instituted, and the jurisdiction of the court attached, when the notices, signed by the Attorney General, were "served" upon the delinquent railroad companies "in the same manner as a summons is directed by law to be served" *(R. 135)*. Those proceedings were then in exactly the same status as that of any other proceeding for docketing a judgment and issuance of execution in a suit at law in which the amount of the indebtedness, or claim, has been established by final judgment of a competent tribunal. The statute directs the Attorney General to sign and issues the process, after which it goes to the sheriff of the proper county and is served exactly as the process in an action at law or a suit in equity is served. If notice of a motion is sufficient to institute "proceedings" under section 265, as was held in *Am. Surety Co.* v. *Baldwin*, 287 U. S. 156, 165, a "notice" signed by a state officer thereunto authorized by the statute, and served like a summons is sufficient. Petitioners and the District Judge regarded, and relied upon those notices as a sufficient threat of irreparable injury for their prayer for preliminary and final injunctions *(R. 110, 224, 332)*.

Those notices initiated a proceeding which constituted a step in the process of obtaining satisfaction of the judgments of the State Board of Tax Appeals. Such a proceeding would have been necessary to collect any taxes remaining unpaid for ten days after either the due date, or the final determination of any reviewing litigation in any court,

state or federal as the case may be. The situation is, therefor, identical with that described in *Hill* v. *Martin,* 296 U. S. 393, 401-2, where the court held that a similar proceeding authorized by law, but not yet begun, to collect inheritance taxes would not "be, in legal contemplation, independent action" *(bottom p. 401),* and that the application of section 265—

> "* * * includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings * * *. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other * * *. Thus, the prohibition applies whatever the nature of the proceeding, * * * *(p. 403).*

Section 22 of the inheritance tax act *(P. L. 1909, p. 336)* directs the Attorney General to prosecute a similar proceeding before the Ordinary for the collection of inheritance taxes determined by the State Tax Commissioner, or any reviewing court (under consideration in the *Hill* case), under precisely similar circumstances and in like manner as section 14 of the railroad tax act *(R. 135)* directs him to institute a proceeding before a justice of the state Supreme Court for the collection of railroad taxes. In both instances the Attorney General is the same "ministerial officer" charged by the statute with the duty of initiating

the final "step" to bring the tax litigation "to the close of final process". It is then the province of the state Supreme Court to effectuate that purpose in that proceeding.

That final step had been effectually initiated when the 1934 and 1935 suits were instituted in the District Court, and it was the proceedings already initiated by that step, and the proposed initiation of the same step in the 1936 cases, that the court was requested to, and did, enjoin. In the *Hill* case the court held that section 265 applied to prevent an injunction to restrain the *initiation* of that step, even where such proceeding had not yet been actually instituted, which covers the situation in the 1936 cases.

It is clear that these suits constituted a collateral attack upon these tax judgments, and were designed to, and the judgments did, enjoin proceedings in the state Supreme Court to docket the tax judgments in that court where executions could issue in the same manner as is provided by law for civil judgments, as the next step in the process of collecting the tax imposed. The situation is so similar to that before this court in *Hill* v. *Martin,* described at page 401 of this court's opinion, that the decision in that case is controlling here.

The Circuit Court correctly held that those proceedings were "supplementary judicial proceedings for the collection of taxes already ascertained" *(R. 1802),* and that they restrained proceedings in the court of a state, in violation of section 265 of the judicial code.

V.

These suits were in substance brought against the State of New Jersey without its consent, in violation of the Eleventh Amendment of the Federal Constitution.

This defense was pleaded in the answers *(R. 145, 327, 351)* and the Circuit Court so held *(R. 1802)*. This contention was opposed by petitioners on the claim that respondents, although named as defendants solely in their capacity as state officers, acted contrary to the state constitution and laws in the method of valuation adopted in making the assessments in question. They do not challenge the constitutionality of any state law.

It is not disputed that the assessments were made under state law; that the taxes were payable into the state treasury for distribution according to state law; that respondents were state officers having no personal, or pecuniary, interest in those taxes; that the collection proceedings sought to be enjoined were mandatory upon them, or some of them; and that such proceedings are required by law to be instituted, and judgment entered, "in the name of the State of New Jersey as plaintiff" *(R. 135)*, against a delinquent corporation, "as defendant," for the collection of taxes levied against such corporation, whether contested or uncontested.

The settled law of the state is that, in such case, a state officer, or department, charged with, and performing, a statutory duty, acts as the *alter ego* of the state; that in suits against them, respecting their official acts, the state is the real party in interest, and that such suits are, in fact,

against the state, *Curtis & Hill &c. Co.* v. *State Highway Com.*, 91 N. J. E. 421, 434; *Union Indemnity Co.* v. *State Highway Com.*, 105 N. J. L. 656, 657; *Strobel Steel Constr. Co.* v. *State Highway Com.*, 120 N. J. L. 298, 300-304. The last two cases were decided by the Court of Errors and Appeals, the highest court in the state, and establish the state law on this question.

Four of petitioners are foreign corporations, citizens of other states, (who did not rest their suits on the ground of diversity of citizenship), and the Eleventh Amendment applies directly to their twelve suits. The other two petitioners are domestic corporations, citizens of New Jersey, who have no right whatever to bring these suits. For all of the petitioners their exclusive remedies for review of their assessments and taxes were those above discussed in Point II.

Federal jurisdiction in these cases rests on the sole ground of alleged violation of the due process clause, resulting from the use by respondent, State Tax Commissioner, as a state officer, of alleged erroneous methods of valuation. If, as shown in Points II and III and as the court below has twice held, these assessments were made in conformity with state law, none of these respondent state officers "have attempted to enforce an unconstitutional law or to administer a valid law wrongfully" *(R. 1802)*.

Respondents acted in strict accordance with the *requirements* of unchallenged state laws *(R. 1802)*, as construed by the courts of the state continuously since 1885 and the challenged methods of valuation are now firmly embedded in the laws of the state. *Lehigh Valley R. Co.* v. *Martin*, 100 Fed.

(2d) 139, 143; *Cert. denied*, 306 U. S. 651; *rehearing denied*, 306 U. S. 669-70; *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 310 U. S. 362, 369-370. The consent of the state is not claimed, and was never given. On the contrary, its statutes prescribed an exclusive remedy in the state courts.

All of these suits are suits against a state, and violate the Eleventh Amendment.

VI.

Petitioners had a plain, adequate and complete remedy at law.

This defense was pleaded in the answers *(R. 145, 236, 350)*. The Circuit Court held that a "plain, speedy and efficient remedy" "was afforded to plaintiffs (petitioners) by the law of New Jersey" *(R. 1803-4)*. Petitioners have entirely ignored this defense.

The applicable provisions of the state law, and the proceedings by which such remedy may be had, are above described in Point II of this brief. In the pursuit of that remedy through the state courts and in this court petitioners were entitled, by express provisions of the law *(R. 132-3)*, to withhold the payment of any part of the taxes in "substantial controversy" throughout the entire progress of such a litigation. Hence there was no question of the duty to pay taxes pending contest, or of the right to recover-back excess payments, or interest thereon, or of irreparable injury pending the litigation.

The availability of such a remedy (with a stay of disputed taxes) is conceded in the complaints filed in these

cases. The reason stated for not pursuing it was that it "would be futile and unavailing * * * under prior decisions of said court (N. J. Supreme Court) on complaints identical in character with those herein above set forth" in the contest of "the assessments of said property * * * made in the same manner as the assessments thereon for the year 1933, which was sustained by the State Board of Tax Appeals and the New Jersey Supreme Court * * *" *(R. 111).*

If that reason were valid, plaintiffs would be entitled to shop around until they found a court that was willing to decide the same issues differently. That reason, however, was equally applicable in these cases in the federal courts, since, on the identical record upon which the State Board and the state Supreme Court decided the 1933 cases, the District Court and the Circuit Court reached the same conclusions in *Lehigh Valley R. Co.* v. *Martin,* 19 Fed. Supp. 63; aff. 100 Fed. (2d) 139.

The Fourteenth Amendment does not guarantee a favorable decision to every litigant. *Worcester County Trust Co.* v. *Riley,* 302 U. S. 292, 299. "The contention that such a decision is erroneous does not present a federal question." *Bell Tel. Co.* v. *Pa. P. U. Com.,* 309 U. S. 30, 32.

The necessity of pursuing such a remedy did not deny to petitioners due process of law, or any other federal right. *Burrill* v. *Locomobile Co.,* 258 U. S. 34, 36-9; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 342-3; *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 404; *Illinois Cent. R. Co.* v. *Minnesota,* 309 U. S. 157, 165; *Atlas Life Ins. Co.* v. *Southern,* 306 U. S. 563, 570-1.

The *identical* remedy by *certiorari* in the New Jersey Supreme Court was held to be an adequate remedy for review of all questions of law and fact, and to afford due process under the federal constitution, in *Lehigh Valley R. Co.* v. *Board P. U. Com'rs.*, 278 U. S. 24, 36-40 and *Hill* v. *Martin*, 296 U. S. 393, 398-9, 400.

The competency of the state courts to hear and determine all questions of law and fact, including federal questions with a review in this court, and that such a course of litigation affords an adequate remedy at law, and due process of law under the Fourteenth Amendment, has been sustained in many cases, including *Indiana Mfg. Co.* v. *Koehn*, 188 U. S. 681, 687, 690, 691; *Keokuk & Hamilton Br. Co.* v. *Salm*, 258 U. S. 122; *Grubb* v. *Public Utilities Com.*, 281 U. S. 470, 476; *Am. Surety Co.* v. *Baldwin*, 287 U. S. 156, 165, 167, 169; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 95-6; *Worcester County Tr. Co.* v. *Riley*, 302 U. S. 292, 298.

In *Minnesota &c.* v. *Probate Court*, 309 U. S. 270, 277, in answer to the contention that the state courts might construe a state statute in such a manner to deprive a person of due process of law under the Fourteenth Amendment, this court said:

> "On the contrary, we must assume that the Minnesota courts will protect appellant in every constitutional right he possesses."

With an open road to an independent judicial review and determination of all questions of law and fact involved in the contest of these assessments through the state courts, with the opportunity of a final review in this court, with-

out the necessity of paying one penny of the disputed taxes, petitioners had a plain, adequate and complete (or a plain, speedy and efficient) remedy at law, within the meaning of Section 267 of the Judicial Code *(Title 28, Sec. 384, U. S. C. A.)* and the decisions of this court.

VII.

Earnings is not the dominant factor in tax valuations under New Jersey law.

Near the end of Point III this (third) ground assigned in petitioners' supporting brief *(p. 2)* was reserved for separate discussion under this point.

In the contest of petitioners' 1933 taxes, the State Board of Tax Appeals held that "The statute does not prescribe any specific method for determining true value"; that "it contemplates a physical valuation of each class of property" *(Supra, p. 14)*, and that "there is no legislative enactment in this State which prescribes the * * * earning method * * * as criteria for determining the true or market value of railroad property" *(Supra, p. 16)*. That decision was affirmed by the state Supreme Court *(Supra, p 17)*. The court below held that the methods used "have received the sanction of the Courts of New Jersey and are now firmly embodied in its laws" (*Lehigh Valley R. Co.* v. *Martin*, 100 Fed. (2d) 139, 143) and that they "conform to the New Jersey laws" *(R. 1799)*. Hence, the question discussed under this point is a question of state, and not federal, jurisdiction.

The Pattern of the Case.

Petitioners' experts testified *(R. 1058, 1153, 1167, 1173, 1174)* that their formula method, based on earnings, was shaped to conform to the pattern of the formula approved in *Great Northern Ry.* v. *Weeks* (297 U. S. 135). The cases were so argued, and briefed in the District Court *(R. 67)* and in the court below, both on the main argument *(R. 1799)* and in the petition for rehearing *(R. 1848-70)*. That is the chief basis of petitioners' petition and brief here *(pp. 4, 13-25)*.

Distinguishing Characteristics.

The court below held that, in its subsequent decision in *Nashville C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, this Court "clearly indicated that *Great Northern Ry.* v. *Weeks* is to be restricted to its own facts if it is not to be considered overruled" *(R. 1800)*, and that the *Nashville* case was distinguishable, in principle, from the *Great Northern* case for reasons stated. This distinction is obvious from the quotation given *(R. 1800-1)*.

In the *Great Northern* case violation of the due process clause (the only federal question found) was held, constructively, on the theory that an excessive valuation presented a case of constructive fraud. The *Nashville* case holds directly opposite. All that was said in the *Great Northern* case about the results of the economic depression, and judicial notice of the affects thereof, was unnecessary to the decision. The bare facts were that the state assessors had adopted for 1933 the same assessment used for 1932 *(297 U. S. at p. 142-3)*, except for a reduction representing some abandoned trackage *(p. 143)*. The

undisputed evidence showed that if the assessment for 1933 had been computed on the basis of the state's own method of valuation used in 1932, a reduction of thirteen million dollars would have resulted *(297 U. S. at p. 149)*.

In that case the Court held that the state's method had been wrongly applied. Here the method, itself, and not its application, is challenged. In the face of that record a discussion of the depression affects was unnecessary, and it was not necessary to rely upon judicial notice to support a conclusion.

However, the theory that judicial notice would suffice to support an assumption of a reduction in property values resulting from the depression was definitely overruled in the subsequent decision in *Ohio Bell Tel. Co.* v. *Public Service Com.*, 301 U. S. 292, 300-1.

These are the restrictive facts of the *Great Northern* case which justified the distinction noted in the *Nashville* case *(at p. 371)* and in the decision of the court below in this case. The theory that a violation of due process can be inferred from an excessive valuation was definitely overruled *(at p. 371)*. Since this is the only ground upon which denial of due process (the only federal question presented) is claimed in these cases, it is the doctrine of the *Nashville* case, and not of the *Great Northern* case, that governs.

Earnings Method.

In their petition and supporting brief, petitioners rely, as they did in the District Court and in the court below *(R. 1798)*, both on the main argument and on petition for rehearing *(R. 1848-1888)*, chiefly upon the contention that, in making the assessments in question "no consideration

whatsoever was accorded other elements, such as earnings" *(p. 2)*. Save for the earnings element, the brief is silent as to the "other elements" referred to. Throughout the brief it is repeatedly stated, and laid as the hypothesis of the argument, that *no* consideration was given to earnings. This hypothesis is erroneous in fact, as well as in theory.

The obvious and direct answer to this objection is found in the uncontradicted testimony of the Chief Engineer of the Division of Engineering and Railroad Taxes of the State Tax Department, who made these assessments. He testified that functional depreciation, reflecting earnings and traffic conditions, was taken into consideration in the valuation of all four classes of property *(R. 1447)*, and that

> "A general reduction in the physical value of these railroads of about $52,000,000. was made because of the decline in traffic and earnings of these railroad companies" *(R. 1450)*.

This important testimony cannot be disregarded. The only questions are whether that was enough allowance on that account and whose knowledge and judgment is to govern the subject. Is the court in a better position to do that than the assessor? This question is answered in the cases cited in Point III.

During the years of increasing prosperity some states having lean railroad lines attempted to increase their revenues from railroad taxation by the adoption of formula methods of valuation. A hypothetical system value, determined by the use of capitalized earnings or market value of stocks and bonds, or a combination of both, was appor-

tioned to the state by a formula combining varying mixtures of traffic, operating and property factors which, intrinsically, bore little or no relation to quantity or quality of the property located within the state.

The effort to increase state assessments by the choice of favorable allocation factors provoked most of the litigation of state taxes in the federal courts. While this court has often adjudged disputes over the merits and quality of the elements, it has ever attempted to impose a formula method of any kind upon a state to override its own different system of taxation.

None of the eastern seaboard states have (even during the periods of highest earnings and security values when it would have been to their advantage) departed from the long established practice of taxing railroads on an *ad valorem* basis applied to the specific property located within its borders. Until the recent depression cut down earnings and security values none of the railroad companies in those states complained of the established method, or advocated a formula method, in their tax contests. This change of attitude on the part of petitioners occurred in 1933 *(Point II)*. In Virginia, the formula basis was first urged before, and rejected by, the State Corporation Commission in the contest of 1937 taxes of the Seaboard Air Line Railroad Company, *(In the Matter of the Assessment for Taxation and Taxation for the year 1937 of the property and the Annual State Franchise Tax of Railroad and Canal Corporations and Companies, decision dated September 8, 1937)*.

The formula (sometimes called the "unit") method ignores all of the elements of value, such as quantity,

quality, condition, location, cost, or local value, of specific property located in a given state or taxing district. It presumes a "commercial" value of the entire railroad enterprise, from which are deducted treasury assets, non-railroad property, working capital, good will, and other incorporeal property, in order to find a residuum representing the value of property locally taxable by the states. That residuum is then apportioned to the states by a more or less arbitrary formula. If the property of a railroad system is homogeneous throughout, a fair approximation may be reached; otherwise the results are fanciful and synthetic, and the property, itself, must be appraised to obtain any rational valuation.

Earnings indices are unreliable where counteracting elements of value exist among the parts of an unhomogeneous railroad system.

In *Rowley* v. *Chicago & N. W. R. Co.*, 392 U. S. 102, 110-11, this Court held that the value of railroad property *in a state* does not rise and fall with the increase or decline of ton miles, passenger miles, car miles, engine miles or gross revenue *in any other state or upon the balance of the system.* The trial judge based his consideration of earnings upon the invalid assumption that the earnings of these several petitioners declined uniformly throughout the different states in which they operated, and that traffic over, and the revenues from, the property assessed in New Jersey suffered the same rate of decline as in other states. That is necessarily a matter of proof, of which none was offered in these cases.

Terminals.

The distinguishing characteristic of the New Jersey railroad properties is the fact that they form the extensive waterfront, and supporting, terminals of numerous trunk line railroad systems at the Port of New York, which dominates the largest producing and consuming area, and the greatest volume of coastwise and foreign commerce, in the United States, if not in the entire world. Here we have the reverse of the conditions in North Dakota, which the railroad companies urged in *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 143-4 and *Wallace* v. *Hines*, 253 U. S. 66, 69, as the reasons why their railroad terminal areas lying outside of that state should be considered and valued separately from their "relatively cheaper" railroad lines in that state. They said:

> "* * * while these (terminals) include little mileage they contribute as much to system value in proportion to cost as do the cheaper stretches of the road where the same investment is spread over much greater mileage." *(Great Northern* v. *Weeks,* at page 144).

For the same reason that the court in those cases held that a state could not, by a formula method of valuation, reach beyond its borders to include the influence of the higher valued terminals and more costly property for the purpose of enriching its own valuations, the reverse condition here prevents petitioners from diluting the value of their New Jersey property by the influence of less valuable properties outside the state.

It is "the geographical position and size of New Jersey" and the existence in New Jersey of "some of their

most valuable terminals in the country" which makes "the matter of taxation of railroads a problem different than that in probably any other state," *(Lehigh Valley R. Co. v. Martin, 19 F. Supp. at pp. 75, 78)*. Those facts convinced the same trial judge, in the 1932 cases and in these cases, that the formula method of valuation proposed by the petitioners was inapplicable to the State of New Jersey.

The record contains a complete description of the railroad lines *(Exhibits D-183 to D-192, inclusive)*, and of the extent, physical characteristics and use, of the waterfront terminals in New Jersey, *(Exhibits D-193 to D-205, inclusive)*. Complete tax maps *(Ex. D-110)*, and a graphic picture, of these terminal areas on New Jersey waterfront on a large scale map *(Ex. D-111)* are in evidence. The supplementary waterfront facilities, and their use, on the New York side are shown on Exhibit D-206 to D-209, inclusive.

The undisputed evidence shows that the type of construction of the railroads and their appurtenances in New Jersey is more elaborate than on the other parts of petitioners' systems, and that the large New Jersey terminal areas have been specifically developed for freight handling and conjunctive rail-water transportation of inter-harbor, coastwise, and trans-Atlantic freight *(R. 1434, 1439-41)*.

The strategic value and use of the terminals on the New Jersey side are described in the record *(R. 1434, 1500, 1527-1622)*. The advantages of location are proper elements of value, *State* v. *Flavell & Fredericks*, 24 N. J. L. 370, 384-5; *Susquehanna Power Co.* v. *State Tax Comm.*, 283 U. S. 291, 296.

The development of railroad transportation in New Jersey is the subject of an exhaustive study made under

the direction of the Department of History of Princeton University, the results of which were published in 1939 in a book entitled *"From Indian Trail to Iron Horse", the Princeton History of New Jersey.* The development of each railroad system is there described:

Central Railroad of New Jersey, pp. 364, 385-6, 388.

Lehigh Valley (Lessor companies), pp. 245, 386-7, 389.

Pennsylvania Railroad, pp. 276, 317, 318, 369, 346, 365, 366, 370, 388.

Erie, (Lessor companies), pp. 317, 374-5, 365, 377, 378, 379, 380.

Reading—B. & O., pp. 319, 390.

D., L. & W. (Lessor companies), pp. 363, 379-383, 386, 389. This company acquired its New Jersey properties in competition with another trunk line railroad company *(pp. 382-4).*

That history shows that the use of the property of the several separately incorporated railroad companies in New Jersey by the interstate systems of foreign corporations was inspired solely by the desire to make accessible to the northern, western and southern sections of the country the rich commerce of the Port of New York, whose transportation advantages are set forth at length at pages 10-11. The strategic and geographical advantages which developed these terminals are fully described at pages 406, 416.

Commencing where that book ends, the subsequent acquisition of the New Jersey railroad properties by still greater interstate lines is described in the record *(R. 1422-8),* which also shows the stock control of the New Jersey

railroads acquired by larger transportation systems: Central Railroad of New Jersey by Reading Company *(Ex. D-141);* Reading Company by B. & O. Railroad Company *(Ex. D-142);* three New Jersey railroad companies by Lehigh Valley Railroad Company *(Ex. D-151);* Lehigh Valley by Wabash Railroad Company *(Ex. D-143);* Wabash (including Lehigh Valley) by Pennsylvania Railroad Company *(Ex. D-144);* N. Y., S. & W. Railroad Company, New Jersey & New York Railroad Company *(Ex. D-147)* and thirteen other New Jersey railroad companies *(Ex. D-150)* by Erie Railroad Company; Erie Railroad Company by Chesapeake & Ohio Railroad Company *(Ex. D-146);* and West Shore Railroad Company and New Jersey Junction Railroad Company by New York Central Railroad Company.

The fact that neither earnings nor security values influenced the prices paid at *bona fide* sales of stock control of New Jersey properties is evidenced in this record by the fact that, in purchasing control of Lehigh Valley Railroad Company, Pennsylvania Railroad Company paid $119.30 per share for $50 par value stock *(Ex. D-143)* in 1928, when the average market price (for the year) of that stock was $97.37 per share *(Ex. P-16).*

The object of these acquisitions of stock was to gain control, on favorable terms, of the New Jersey waterfront terminals to attract and accommodate a greater volume of trans-continental, coastal and foreign traffic over the lines of these controlling companies. Where they could not buy control, they leased the franchises and properties of the New Jersey companies at high rentals, which are still in force, for the same purpose.

The purpose of this explanation is to show that the net railway operating income *of the operating companies, alone,* does not *include* all of the earnings derived from the use of the New Jersey properties. A substantial amount of operating revenue accrues to the controlling, or lessee, companies from all of the traffic which they handle to and from these terminal properties over their own lines outside New Jersey and which is not included in the operating revenues of the controlled or lessor New Jersey companies. In addition, there is a very large amount of operating revenue accruing to other railroad companies throughout the United States on traffic over their lines outside New Jersey which moves to and from these terminals through interchange connections with these New Jersey operating companies located at various points along their lines and connections. A substantial differential is always allowed to terminal carriers in apportioning a through rate.

Also, portions of the New Jersey terminals, consisting of improved lands, docks, piers, slips, bulkheads, warehouses, and yards, are leased, in exclusive or joint occupancy, to other railroad and private corporations for steamship piers, coal docks, processing plants, yards, trackage rights, etc. *(Exs. P-214a, D-27, D-28, D-33, D-33a, D-34 to D-39, inclusive, D-48 to D-50, inclusive).* A portion of such rentals, aggregating large sums of money, are included in the *corporate* income of these companies, and is not included, or reflected, in their net railway operating income, as arbitrarily classified in their reports to the Interstate Commerce Commission. Examples of rental income which is not included in net railway operating income were given by the witnesses Graham *(R. 1637, 1667-8, 7014)* and Van

Hook *(R. 1720, 1722)*. Mr. Graham testified, as a duly qualified expert *(R. 1622-3)*, that if system value, determined by earnings, should be used as a basis of taxation of the property in New Jersey allowance should be made for the special status of the terminal properties, either by valuing the terminals separately from the rest of the line or in the manner in which the railroads themselves determine the values of jointly operated terminals for the apportionment of their respective contributions to the cost of operation and maintenance *(R. 1668)* namely, on the basis of the relation between extent of use and cost. He also testified that the special value of terminal properties, particularly those involved in these cases, as compared with other railroad property, is demonstrated by a number of examples of higher values of terminal securities given in his testimony *(R. 1660-6)*. It is also demonstrated in reorganization proceedings by allowances at par to holders of terminal securities and lessors.

The income accuring to the controlling corporations, the owning (lessor) companies, and the connecting carriers, and the rentals from the assessed property above mentioned accruing to petitioners themselves from these other courses, are not included, or reflected in the earning figures tabulated in the opinion of the trial judge *(R. 50-54)* or in the findings of fact *(R. 38-88)* upon which he predicated his criticisms of the valuations as not adequately reflecting the influence of earnings.

The trial judge compared net railway operating income and assessments for 1928 with those of 1936 *(R. 83-7)*, in disregard of the undisputed evidence that, during that

period, new property of about 46 million dollars valuation had been added by the contesting companies *(Ex. D-114)*.

Most of the larger expenditures for additions to property made since 1929 had not, by 1936, had an opportunity to be reflected in the earnings; first, because the improvements had not yet been fully utilized, and, second, because many of them, like bridges, electrifications, yards and stations, were built to meet future transportation needs which have since come into substantial use. Nevertheless allowance for these conditions was made in the valuations *(R. 1429, 1432)*.

A Conspicuous Example.

In New Jersey the operating companies are not taxed for property owned by their lessors. Only two of the petitioners own, or are taxed for, real property or franchises in New Jersey. The other four are taxed only for personal property used in the state. There is no evidence in this case of any earnings of 39 of the 44 companies whose taxes are tied up in these cases. All of the real property and franchises involved in these taxes are owned, and taxed, exclusively, against 40 of those companies, only two of which are petitioners here.

One of those 40 companies is the New York and Long Branch Railroad Company (one of the petitioners). Its complaints were the same as those of the other petitioners in every material allegation, and likewise traversed in the answers. It offered no exhibits *(R. 9)* or testimony. The only evidence which related to it, even in the remotest degree, was contained in Exhibit 418, offered by Central Rail-

road of New Jersey (not a petitioner here), which included therein only the operating revenue derived by the *Central* company from the operation of its own trains over the Long Branch Railroad. The Long Branch Railroad Company stood before the court without a scrap of evidence to support its burden of proof, or the decree of the district court in its favor.

Petitioners' brief contains nothing relating to the Long Branch company. Its entire capital stock is jointly and equally owned, and its property is exclusively and jointly used, by the New Jersey Central and the Pennsylvania Railroad companies. Although the record is clear that Pennsylvania Railroad company operates over, and derives income from the use of, that railroad property, jointly with the Central, the trial judge accepted the figures on Exhibit 418 as representing the *total* "Gross Revenue" *(R. 54)* of the Long Branch company, and, without any other evidence whatever, concluded that that company was entitled to an injunction.

The Long Branch company operates no trains and conducts no common carrier business. It owns, and maintains at the expense of the Central and Pennsylvania companies, a section of railroad whose only function is to connect for through traffic separated parts of the railroads of those two companies, respectively. It has no net railway operating income, and no earnings except the rent, which includes its bond interest and taxes, paid to it by those joint users. Obviously, any fair representation of "earnings" from the use of that property must (but the record does not) include the earnings derived by the Pennsylvania Railroad Company from its use of that property.

Impartial Expert Opinion.

When the statute provided that the assessor shall measure the taxes levied against railroad companies by the "true value" of their property it contemplated the same conception of that term as it is elsewhere defined in the tax laws, namely as the "price" which *"in his (the assessor's) judgment,"* the property "would sell for at a fair and bona fide sale at private contract" on the assessing date. *(R. S. 54:4-23),* and that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value". *(N. J. Const., Art. IV, Sec. VII, pgf. 12.)*

In the absence of an actual sale of the property under valuation, "true value" can only be an estimate based upon experience, intimate knowledge of the property, and mature and competent judgment. The law confers upon the assessor the power and duty to make that estimate as the official, *prima facie* valid, appraisal for taxation. Differences of opinion among *unofficial* appraisers is insufficient to overthrow the validity of the assessor's appraisal. It can be overthrown only by competent and convincing proof. The New Jersey Court of Errors and Appeals, in 1885, *(State Board* v. *Central R. Co.,* 48 N. J. L. at p. 292) stated, and the state Supreme Court, in 1934, (*Central R. Co.* v. *Martin,* 114 N. J. L. at p. 77) repeated, the following conclusion:

> "If this value ("true value") is fixed as the basis of taxation, the method and agencies to be used to ascertain it, belong to the legislative, and not the judicial province."

In the present cases the trial judge rejected, not only the method but also, the valuations suggested by peti-

tioners' expert witnesses *(R. 39-41, 49)* and expressly found that their method "is not productive of true value and that such formulaic valuation does not reflect true value to any greater degree of accuracy than the method presently employed by the State of New Jersey" *(R. 83)*. No other proof of the value of their properties was offered by petitioners.

In *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 370, this Court said:

> "But railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a 'full cash value' for a railroad is in many respects artificial. See 1 Bonbright, Valuation of Property, pp. 511-632. Whatever may be the pretenses of exactitude in determining such a 'value', to claim for it 'scientific' validity, is to employ the term in its loosest sense."

The above mentioned page reference *(pp. 511-632)* to Dr. Bonbright's work includes (at pages 531-547) his discussion of the New Jersey method of valuation of railroad property. That discussion embraces the results of his special study of, and his views concerning the New Jersey method expressed by him as an expert witness on behalf of respondents in the contest of petitioners' (and other) appeals from the 1934 assessments and taxes (involved in these cases) before the New Jersey State Board of Tax Appeals. In that testimony, he not only criticized the methods of petitioners' experts in these cases, but supported the New Jersey method. He had since testified similarly before that Board in the trial of petitioners' appeals from the 1937 and 1938 taxes.

At the annual meeting of the National Tax Association at Baltimore, Maryland, October 25-28, 1937, the entire afternoon session (October 27, 1937) was devoted to papers and discussions on the "unit" (or formulaic) valuation of railroad property for taxation, *Proceedings, 30th Annual Conf., Nat'l Tax Assn., (pp. 229-301)*. One of petitioners' counsel at the trial of these cases criticized *(at pp. 282-6)*, and Dr. Bonbright defended, the New Jersey method. The latter's remarks *(pp. 294-5)* are printed as appendix "A" to this brief. Two short sentences will suffice here:

> "That is, that the use of the unit rule cannot possibly result in the ascertainment of the true value of that part of the railroad which lies in any one state" *(p. 294)*.

> "The state of New Jersey, it seems to me, and not the railroads, is more nearly right in insisting that its method will get the true value of these properties in New Jersey" *(p. 295)*.

Mr. Frank E. Barnes, a recognized expert of more than forty years of practical experience, and author of a standard text book, on property valuation *(R. 1460)*, agrees with Dr. Bonbright. From March, 1916, to the end of January, 1932, he was valuation engineer of the New York Central Railroad Company, and has had personal experience in valuing some of the railroad terminal properties in question *(R. 1462)*. He made an extensive examination and study of the records and methods of valuation used by the State Tax Department of New Jersey to determine the valuations involved in these cases *(R. 1463)*. He testified that that method "is a rational method for determining the physical value of those properties" *(R. 1465)*; and

that it is the only method, of which he has knowledge, that would permit the classification of property and geographical divisions of second class property, as required by law in New Jersey *(R. 1466)*. The conclusion stated in the last phrase is confirmed in *Central R. Co.* v. *Martin*, 114 N. J. L., at page 74, and was conceded by the trial judge in these cases *(R. 40-41)*.

Although the trial judge said he was "unprepared to state to what extent the assessments are excessive" *(R. 74)*, and did not undertake "an exercise of judgment as to the amounts of the assessments" *(R. 76)*, without setting aside a single assessment, he enjoined the collection of 30% of the taxes on admittedly "arbitrary conditions" *(R. 76)*, because he thought the extent of consideration of earnings given by the assessor, in the exercise of his judgment *(R. 1447, 1450)*, was not sufficient. Here was an unlawful substitution of judicial experiment for the lawfully exercised judgment of the assessor. The state taxing authorities were thus left to make as many *guesses* as may be necessary to hit upon the mystical correct amount concealed in the judge's mind. As a hostage against a correct *guess*, the judge authorized petitioners to withhold from the State of New Jersey over *eleven million dollars* of its public revenue. This was an arbitrary abuse of judicial power. It is devoid of any recognition of the right of the state to govern or control its own public revenues. Must New Jersey obtain the trial judge's approval of its assessments of railroad property before it can collect the taxes? That is what his decision in these cases amounts to.

Depression Taxes.

Any virtue which the use of earnings may have in prosperous times is a total loss in periods of depression, such as has been experienced since 1931, because such periods produce their own demands for increased public revenue, and tax systems must be maintained, or devised, and revenues increased, to meet those demands.

If public revenue was based upon the theory adopted by the trial judge, and advocated by petitioners here, there would be nothing to support the government during periods of depression, when, as our experience during recent years shows, a larger amount of public revenue, both state and federal, has become neecssary by reason of the depression itself. This fact has been recognized by the courts in many cases, *Central Realty Co.* v. *Board of E. & R.,* 110 W. Va. 437, 158 S. E. 537, 538; *Somers* v. *City of Meriden,* 174 Atl. 184; *Sweet* v. *City of Auburn,* 180 Atl. 803, 804; *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362. Fluctuations of earnings, or unprofitable use of property, afford no legal basis for the reduction of assessments for *taxes. Bass R. & G. Ltd.* v. *State Tax Com.,* 266 U. S. 271, 284; *Underwood T. Co.* v. *Chamberlain,* 254 U. S. 113, 120; *Providence Bank* v. *Billings,* 4 Peters (29 U. S.) 514, 562; *Milwaukee, E. R. & L. Co.* v. *Wisconsin,* 252 U. S. 100, 105. This question was so decided in New Jersey as far back as 1879 in *State, N. J. S. R. R. Co.* v. *Railroad Com'rs.,* 41 N. J. L. 235.

"* * * the measure of the impost rests in the discretion of the legislature", *Stewart D. G. Co.* v. *Lewis,* 294 U. S. 550, 562.

Valuation of property for tax purposes is an estimate of value intended to measure, when multiplied by the tax rate, the proportion of the public revenue which the owner is required to contribute to the budgetary requirements of the government, including provision for the benefits of fire, police and other protection, and numerous other public benefits and facilities incident to the administration of government. The cost of government does not fluctuate according to the economic prosperity of the taxpayers. The amount of public revenue is previously established by budgets. If the valuation is high the rate will be low, and *vice versa*. Either way the result is the same in dollars to the taxpayer.

Depression emergencies have required the expenditure of hundreds of millions of dollars by federal, state and local governments since 1931. Now, the new emergency of preparedness threatens to require *billions* of dollars more during the next few years. Private property, of one kind or another, is the principal source of revenue to meet those demands for either capital payments or debt service, and, since New Jersey has no income tax and these railroad taxes are, by law, inclusive of all taxes upon the company and property, the brunt falls, eventually, upon property taxes.

Whatever may the divergent views of economists, this is a practical situation which must be faced so long as duly constituted legislative bodies are clothed with legal authority to determine and budget public expenditures. Where, as here, the legal authority exists, the courts cannot substitute the individual, or collective, opinions of judges, for the judgment of state and municipal bodies, duly consti-

tuted and clothed, by the legislatures, with that power if exercised according to the laws of a state. The same authority legally exercised by Congress, respecting federal taxes, must be accorded by this Court to the states respecting state taxes.

The affects of the depression upon taxes and revenues in New Jersey during the years 1931-1936, both inclusive, are illustrated, in so far as official data has been published, in appendix "B" to this brief.

The natural effect of a prolonged depression is to shrink property values and income. The circumstance described above (and shown in appendix "B") illustrate the folly of trying to meet increased demands for public revenue from taxes measured by depression earnings.

The philosophy of the dissenting opinion of *Justices* Stone, Brandeis and Cardozo in *Great Northern R. Co.* v. *Weeks,* 297 U. S. 135, 153-157, and headnote 8 of the unanimous opinion in *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 370-1, points out the fallacy of that theory. In the latter case this Court said:

> "But even assuming that there was an overassessment, constitutional invalidity would not follow. If the needs of a state require higher taxes, the Fourteenth Amendment certainly does not bar their imposition. The maintenance of higher assessment in the face of declining value is merely another way of achieving the same result. *Great Northern R. Co.* v. *Weeks,* 297 U. S. 135 does bar the way."

See, also, *Wisconsin* v. *J. C. Penney Co.,* 85 L. ed. Adv. op. 222, at page 224.

Conclusion.

The petition should be denied.

Respectfully submitted,

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